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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 113.

JAMES S. KEERL, PLAINTIFF IN ERROR,

vs.

THE STATE OF MONTANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

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1 In the Supreme Court of the State of Montana.

STATE OF MONTANA, Plaintiff and Respondent,
vs.
JAMES S. KEERL, Defendant and Appellant.

Record on Appeal.

C. B. Nolan, T. J. Walsh and W. M. Cockrill, Counsel for Appellant.
R. W. Berry and C. A. Spaulding, Counsel for Respondent.

2 In the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade.

Be it remembered that on the 24th day of April, 1902, the county attorney of Lewis & Clarke county, by leave of court, filed an information in the district court of the First Judicial District of the State of Montana, in and for the county of Lewis & Clarke, which said information was thereafter and on the 21st day of July, 1904, the information by leave of court had and obtained, was amended by interlineations, which said information, as amended, is in words and figures as follows:

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA, Plaintiff,
against
JAMES S. KEERL, Defendant.

Information.

In the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke, on this the 24th day of April, A. D. 1902, in the name and on behalf and by the authority of the state of Montana, James S. Keerl is
3 accused by the county attorney of Lewis and Clarke county, Montana, by this information of the crime of murder in the first degree, committed as follows: That, at the county of Lewis and Clarke, in the state of Montana, on or about the 11th day of April A. D. 1902, and before the filing of this information, the said James S. Keerl did, willfully, unlawfully, feloniously, and of his deliberately premeditated malice aforethought, make an assault upon one Thomas Crystal, a human being, and a certain pistol, commonly called revolver, which was then and there loaded with gun powder and leaden bullets, and by him, the said James S. Keerl, had and held in his right hand, he, the said James S. Keerl, did then and there wilfully, unlawfully, feloniously and of his

deliberately premeditated malice aforethought shoot off and discharge at, upon and into the body of said Thomas Crystal, thereby and by thus striking the said Thomas Crystal with the said leaden bullets; inflicted upon the said Thomas Crystal certain mortal wounds in the back, side and head of the said Thomas Crystal (a more particular description of which said mortal wounds is to the county attorney unknown) of which said mortal wounds the said Thomas Crystal did then and there languish, and languishing did live, and thereafter, on the 21st day of April, A. D. 1902, at the county of Lewis and Clarke in the state of Montana, of which said mortal wounds the said Thomas Crystal did die; and so the said James S. Keerl did, in manner and form aforesaid wilfully, unlawfully, feloniously, and of his deliberately premeditated malice aforethought, kill and murder the said Thomas Crystal; all of which is
contrary to the form, force and effect of the statute in such
4 case made and provided, and against the peace and dignity of the state of Montana.

O. W. McCONNELL,
County Attorney of Lewis and Clarke County, State of Montana.

STATE OF MONTANA,
County of Lewis and Clarke, ss:

O. W. McConnell, being first duly sworn according to law, deposes and says: That he is the duly elected qualified and acting county attorney of Lewis and Clarke county, State of Montana, that he has read the foregoing information, made by him as complainant, and knows the contents thereof, and that the facts, matters and things therein stated are true to the best of his knowledge, information and belief.

O. W. McCONNELL.

Subscribed and sworn to before me this 24th day of April, A. D. 1902.

J. L. CALLAHAN,
Notary Public in and for Lewis and Clarke County, State of Montana.

(Endorsed:) No bail. Henry C. Smith, Judge.

5 District Court First Judicial District, Lewis and Clarke County, Montana.

No. 671.

THE STATE OF MONTANA, Plaintiff,
vs.
JAMES S. KEERL, Defendant.

Information for Murder in the First Degree.

Witnesses: J. C. Murray, Franz Fredericks, H. D. Thatcher, John Heinzberger, George Soule, M. H. Bryan, G. H. Scott, B. Hepner,

B. Ascheim, Chas. N. Duffy, Frank Kenck, Gustave Nissem, Ed. Byers, Adam Valles, Wm. Lareau, Thomas Travis, N. Salvaile, B. C. Brooke.

Presented in open court and filed by leave of court this the 24th day of April, A. D. 1902.

FINLAY McRAE, *Clerk,*
By GEO. G. BAYA,
Deputy Clerk.
O. W. McCONNELL,
County Attorney of Lewis and Clarke County, Montana.

Recorded in Information Book C, Page 127.

Witnesses endorsed May 6th, 1903, by order of court: Andrew Lindall, George Cresap, Lloyd Gans and Mary Crystal.

6 In the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade.

No. 387.

THE STATE OF MONTANA, Plaintiff,
vs.
JAMES S. KEERL, Defendant.

DECEMBER 29TH, 1904.

This day again came the State of Montana, by R. W. Berry, county attorney, who in its behalf prosecutes, comes also the defendant, James S. Keerl, in response to his bail bond with his counsel Messrs. Greene and Cockrill. When asked by the court, said that his true name was James S. Keerl. The defendant was then arraigned by the court by having the clerk read to him the amended information. The defendant waived the statutory time and entered his plea of not guilty as hereinafter set out in detail. Thereupon the court continued his bail bond of $20,000.00 to await the trial of the cause.

STATE OF MONTANA, *County of Cascade, ss:*

James S. Keerl, the defendant, pleads that he is not guilty of the offense charged.

II.

He pleads that he has been already acquitted of the offense of murder in the first degree charged herein by the judgment of the district court of the First Judicial District of the state of Montana, in and for the county of Lewis and Clarke, rendered at
7 Helena, in said county, and state, on the 5th day of June, 1903. He was then charged with the offense herein charged and duly tried and convicted of murder in the second degree which operates as an acquittal of murder in the first degree.

III.

He pleads that he has been once in jeopardy for the offense charged herein, to-wit: Murder in the first degree, by being tried for the offense herein charged in the district court of the First Judicial District of the State of Montana in and for Lewis and Clarke county, Montana, at Helena, on the 23 day of June, 1904, at which time and place and upon which trial he interposed the pleas of former acquittal and once in jeopardy of the crime of murder in the first degree, being the offense herein charged, and the issues raised by said pleas were submitted to the jury under instructions of the court directing the jury upon the evidence submitted to find for the defendant and the jury not being able to agree upon the issue raised by the plea of not guilty, were discharged without returning a verdict on the plea of former acquittal and once in jeopardy, although agreeing to return a verdict in favor of the defendant on those pleas; the jury declining to return their verdict in favor of the defendant on the plea of *romer* acquittal and once in jeopardy solely upon the ground that they thought they were not at liberty to return a verdict upon said pleas without likewise returning a verdict upon the plea of not guilty.

He further pleads that he has been once in jeopardy for the offense charged, to-wit: murder in the first degree, by his trial
8 on said charge in the district court of the First Judicial District of the State of Montana, in and for Lewis and Clarke county, on the 5th day of June, 1903, and his conviction at said time of murder in the second degree followed by judgment and sentence.

C. B. NOLAN,
T. J. WALSH,
H. S. GREENE, &
W. M. COCKRILL,
Attorneys for Defendant.

December 29th, 1904.

Minutes of Court During Trial.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 5TH, 1905.

A question existing in the mind of the court as to whether the arraignment of the defendant heretofore in this court and his plea to the amended information were sufficient in law, he was on this day required to appear, and thereupon was duly arraigned in said court by the clerk reading to him the said amended information and delivering to him a copy thereof, and endorsements thereon and list of witnesses and the said defendant stating to the court that his true

name was James S. Keerl and that he was represented by Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill; and thereupon the said defendant waived the statutory time and entered his plea in words and figures as follows.

STATE OF MONTANA, *County of Cascade, ss:*

First Plea.—James S. Keerl, the defendant, pleads that he is not guilty of the offense as charged.

Second Plea.—He pleads that he has already been acquitted
9 of the offense charged herein for that having been by the information herein filed against him charged with the commission of murder in the first degree, he filed to the said information his plea of not guilty, and upon the said information and for the crime therein charged he was tried before a jury regularly empaneled, charged and sworn, which said jury returned a verdict against defendant of murder in the second degree, upon which verdict judgment of the district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke, wherein this cause was then pending, and from which it was removed to this county and court, rendered and entered its judgment against him on the 5th day of June, 1903, adjudging that he, the defendant, was guilty of murder in the second degree; that thereafter the said judgment was by the Supreme Court of the State of Montana reversed and set aside and the cause remanded to the said district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke for a new trial; that thereafter in the said district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke, a jury was duly and legally empanelled, charged and sworn to try this case upon the issues so joined. Whereupon the said court proceeded to hear the testimony in the said cause and witnesses were sworn and examined on behalf of the state in chief, of the defendant and of the state in rebuttal; whereupon, after argument by counsel, being instructed by the court, the said jury retired to deliberate and having on the 14th day of July, 1904, after the expiration of about 24 hours after their retirement to deliberate upon their verdict returned into court, they were questioned by the court as to whether
10 they had agreed, and having reported to the court as the fact was, that they had not agreed, the said jury were by the said court on the said 14th day of July, 1904, without the consent of the defendant and without having arrived at or returned any verdict, discharged, without there existing any necessity for the discharge of the said jury and without there being or existing no reasonable probability that the said jury could or would agree upon a verdict, and without its appearing to the court that there was no reasonable probability that the said jury could or would agree upon a verdict. That upon the said court's having so questioned the said jury as to whether they had agreed, the said court directed the clerk thereof to enter of record that the court found that there was a reasonable probability that the said jury would not agree and that they were,

for that reason, discharged; that save as aforesaid no adjudication or record was made concerning the necessity for or of the cause of the discharge of the said jury and that no necessity for or of the cause of such discharge of the said jury, existed save as recited in the said entry so made and directed to be made. Now the defendant asserts that for the reasons hereinbefore in this special plea set forth he ought not again to be tried for the offense, or for any offense, charged in the information herein and that to do so, in view of the facts aforesaid, would be to place him twice in jeopardy for the same offense contrary to the provisions of the Constitution of the State of Montana, and that any judgment of conviction herein or any proceedings further to hold the defendant to answer to the said information, or the charge therein, or to put him upon
11 trial for the same, would be to deprive him of his liberty without due process of law.

Third Plea.—He pleads that he has once been in jeopardy for the offense charged herein, to-wit: Murder in the first degree, by being tried for the offense in the district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clark, at Helena, Montana, on the 23d day of June, 1903, at which time and place and upon which trial he interposed the plea of former acquittal and once in jeopardy of the crime of murder in the first degree, being the offense herein charged and the issues raised by the said plea were submitted to the jury upon the evidence to find for the defendant and the jury not being able to agree upon the issue raised by the plea of not guilty, were discharged without returning a verdict on the plea of former acquittal and once in jeopardy, although agreeing to return their verdict in favor of the defendant on the plea of former acquittal and once in jeopardy solely upon the ground that they thought they were not at liberty to return a verdict upon said pleas without likewise returning a verdict upon the plea of not guilty.

Fourth Plea.—He pleads that he has already been acquitted of the offense of murder in the first degree charged herein by the judgment of the court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke, rendered at Helena, in said county, and State, on the 5th day of June, 1903. He was then charged with the offense herein charged and duly tried and convicted of murder in the second degree which operated as
12 an acquittal of murder in the first degree.

Fifth Plea.—He further pleads that he has been once in jeopardy for the offense charged to-wit: Murder in the first degree by his trial on said charge in the district court in the First Judicial District of the State of Montana, in and for the county of Lewis and Clark, on the 5th day of June, 1903, and his conviction at said time of murder in the second degree followed by judgment and sentence.

GREENE AND COCKRILL,
C. B. NOLAN, &
T. J. WALSH,
Attorneys for Defendant.

STATE OF MONTANA, *County of Cascade, ss:*

James S. Keerl, being duly sworn, says that he is the defendant above named, that the facts recited in the foregoing pleas and in each of them are true of his own knowledge.

J. S. KEERL.

Subscribed and sworn to before me this — day of June, 1905.

W. M. COCKRILL,
Notary Public in and for Cascade Co., State of Montana.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 5TH, 1905.

This day came the State of Montana, by R. W. Berry, Esq., heretofore appointed by the court to prosecute in behalf
13 of the State, and also C. A. Spaulding, Esq., deputy county attorney of Lewis and Clark county. Came also the defendant in response to his bail bond and with his counsel Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill, and waiving the statutory time in which to prepare for trial. The above entitled action not being concluded, it is hereby ordered that court adjourn until Tuesday morning June 6th, 1905, at 9:30 o'clock.

No. 387.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 6TH, 1905.

This day again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond, and with his counsel, Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill. The State now moves the court to strike out defendant's second plea in its entirety; also his third plea after the figures "1903" in line 5; also his fourth plea after the figures "1903" in line 6, all for the reason that they do not conform to the requirements of the statute. After argument by counsel on both sides, the motion was overruled, to which exception was taken by counsel for the State. Prosecution then introduced and read its replication to the second, third, fourth and fifth pleas of defendant.

Jurors were then called and sworn as to their qualifications to sit in case now pending. The following named were excused for cause:

B. W. Porter, C. H. Burchard, I. D. Askew, A. Gardner,
14 John P. Meier and G. E. Grover. The following named were excused by the State: I. O. Desilets, Frank Woodward, Alex. Chambers and J. W. Schmidt. The following were excused by the defense, defendant having waived his fifth challenge: W. H. Simpson, D. F. Wilson, Thos. J. Kelly and Henry Nollar.

In the course of his examination of Juror Thos. J. Kelly, counsel for the State propounded to him the question as to whether he was opposed to the infliction of the death penalty in case defendant should be convicted of murder in the first degree, to which defendant objected on the ground that the court had not ruled as yet upon the point heretofore raised that defendant could not be tried at this time for first degree murder. After arguments of counsel on both sides, the court ruled that defendant could not now be tried for murder in the first degree, inasmuch as he had been acquitted of that charge when the jury at a former trial had found him guilty of murder in the second degree and he could not therefore be put in jeopardy again on the charge of murder in the first degree, and therefore sustained the objection. Counsel for the State took exception to the ruling of the court.

The regular panel of jurors having become exhausted and the jury not yet being completed, the court ordered a special venire of ten to be drawn from Jury Box No. 3; and in pursuance to said order the following names were duly drawn in open court, from said box:

Otto Branch, P. B. Gallagher, R. L. Arthur, W. W. Miller, H. C. Eggleston, Sam Ford, James Conklin, G. E. Grover, A. Gardner and John P. Meier.

The jury thus far drawn and not challenged and excused
15 were then admonished by the court, and all jurors excused until to-morrow morning at 9:30 o'clock.

(Title of Court.)

(Title of Cause.)

JUNE 7TH, 1905.

Again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond, with his counsel Messrs. T. J. Walsh, C. B. Nolan, and W. M. Cockrill.

In the matter of the special venire of jurors, the sheriff's return shows service on the following: Otto Branch, R. L. Arthur, A. Gardner, John P. Meier and G. E. Grover, the others not being found. Juror Grover having stated during his examination by attorney Nolan for the defense that Wm. Cluston, knowing him to have been summoned as a juror, expressed an opinion to him as to defendant's guilt or innocence, the court ordered an attachment to issue for the body of said Wm. Cluston, returnable at 1:30 P. M.

Thereafter as their names were called came the following named good and lawful citizens of Cascade county, who were duly sworn to

well and truly try the cause, and a true verdict render according to the evidence.

R. L. Arthur, J. Jorgenson, Otto Branch, Carl Gerke, H. Herrin, Chas. A. Mellin, W. J. Patterson J. F. Doneher, Jacob Spengler, Jesse Bennett, Wesley Van Koten, Joseph Donnelly. All other jurors were excused until June 19th, 1905, at 10 A. M.

Whereupon, after statement of case by the State's attorney, and witnesses having been ordered to be excluded, George B. Soule was sworn and examined for the State. The hour of noon having
16 arrived, the court announced that, for the time being, he would allow the jury to separate and, having admonished them strictly, excused them to 1:30 P. M.

Wm. Cluston was brought into court by the sheriff on the attachment for the body heretofore issued, and upon his explanation that both he and Grover were of the opinion that the jury had already been empanelled and sworn in the Keerl case, the court excused him. The jury after being admonished were excused until to-morrow morning at 9:30 o'clock.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 8TH, 1905.

Again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant with his counsel, Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill, and the jury heretofore sworn in and empanelled in the case appeared and took their seats. Whereupon the information in the case was read to the jury by Mr. Spaulding as a part of the State's opening statement which had been omitted. D. D. Kellar, Gustave Nissem, Jacob A. Yund and Bernhard Ascheim, witnesses for and on behalf of the State were sworn and examined. Revolver offered and marked "Exhibit 4". B. C. Brooke, witness for and on behalf of the State was sworn and examined. Bullet offered and marked "Exhibit 5", received under objection. X-Ray photograph offered and marked "Exhibit 6". Defendant objected to its admission in evidence. Objection sustained, exception taken. Isaac Hamberger sworn for State but not examined. Wm. Lareau, Thomas Travis and John M. Moriarity, witnesses for and on behalf
17 of the State sworn and examined. Photographs offered and marked "Exhibit 7" and "Exhibit 8". Mrs. Thomas Crystal and Frank Kenck, witness- for and on behalf of the State were sworn and examined. State offers Exhibit 7 and 8 in evidence, defendant objects. Objection sustained. Excepted to. The case not being concluded the jury was admonished and excused until 9:30 A. M. to-morrow.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 9TH, 1905.

Again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond with his counsel Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill and the jury heretofore sworn in and empanelled appeared and took their seats. Deposition of Chas. H. Duffy taken April 30th, 1902, offered in evidence by State. Objected to by defendant, objection sustained. Excepted to. Leave asked by State to call sheriff of this county as a witness. Granted. Lincoln Wroking and Ed. Hogan, sheriff, witnesses for and on behalf of the State, were sworn and examined. Subpœnas for Charles H. Duffy, a witness for the State sent to all counties within the State with returns thereon from the several sheriffs showing that they had been unable to find him, offered and received in evidence without objection. W. H. McCann, sworn and examined for the State and excused. I. Hamberger recalled and examined for State. Offer to have this witness read stenographic notes at two former trials of this defendant of Chas. H. Duffy's testimony. Objected to by
18 defendant. Jury excused pending argument. Thomas Travis temporarily excused as a witness by consent of both parties. Lincoln Working excused as a witness by consent of both sides. Jury recalled and admonished and excused to 1:30 P. M. Defendant asked leave to have subpœnas issue for Sydney Miller, Christopher Meinz and Max Bigelow stating various reasons for asking. Granted. Lincoln Working recalled and further examined in behalf of State. I. Hamberger excused temporarily. The court here announced that, in sustaining the objection to admission in evidence of the stenographic notes of evidence given by Chas. H. Duffy at a former trial, he based his ruling solely on the fact that the information as already drawn at former trial had since been amended.

State rests.

At this time defendant moves the court that the State be required to introduce Three (3) eye witnesses. Overruled. Defendant then asks leave to have a subpœna issue for D. D. Kellar. Defense asks leave to omit opening statement. Granted. Willian D. Sheehan, Milton Cauby, John Abercrombie, Thos. Flynn, Felix Ingram, James Mason and Arthur T. Greene, witnesses for and on behalf of the defendant were sworn and examined. Jury admonished and excused until 9:30 A. M. to-morrow.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 10TH, 1905.

Again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond, and with his attorneys Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill, and the jury
19 empanelled on a former day came in and took their seats. Cross-examination of Arthur T. Greene resumed. Christopher Meinz, Robert N. Allen, Dr. L. E. Holmes witnesses for and on behalf of the defendant were sworn and examined. At this time the defense proposed to introduce in evidence the deposition of Charlotte L. Evans; to which the State interposed an objection for several reasons stated. Objection overruled. State excepted. Thereupon said deposition was read in part, after which the jury was admonished and excused until 9:30 A. M. Monday.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 12TH, 1905.

Again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond, and with his counsel Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill, and the jury empanelled on a former day came in and took their seats. Reading of deposition of Charlotte L. Evans resumed. Deposition of Elanor P. Keerl introduced and read. Deposition of Charles T. Evans read. Deposition of Dr. John B. Chapin read. Hospital record in connection with the foregoing deposition objected to by State for several reasons stated. Objection sustained, to which defendant took exception. Deposition of Mrs. Augusta I. Moewinckel read. Jury admonished and excused to 1:30 P. M.

Reading of deposition of Mrs. Augusta I. Moewinckel re-
20 sumed. Depositions of Charlotte S. E. House and Mrs. Priscilla A. Welsh read. John Milch, Leon LaCroix, F. W. Kuphal and A. K. Barbour, witnesses for and on behalf of the defendant, were sworn and examined. At this time, defendant asked and was granted a subpœna for Wallace Donaldson and T. B. Hughes. Granted. Deposition of Mrs. Maria S. Crook read under objection by State. Objection overruled. Exception taken, as in the case of all depositions for defense. Deposition of Dr. J. Perry Wade read in part for and on behalf of defense. Hospital record in connection with the foregoing deposition objected to by State.

Sustained. Dr. Charles G. Hill's deposition read. Four hospital records sought to be read in connection with above, objected to by State. Objection sustained. Jury admonished and excused to 9:30 A. M. to-morrow.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 13TH, 1905.

Again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond, and with his attorneys Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill; and the jury heretofore empanelled on a former day in this case came in and took their seats.

Deposition of Wm. S. Bryan read for defense. Deposition of Dr. George J. Preston read for defense. Deposition of Dr. Samuel B. Lyon read for defense. Certificate in connection with fore-
21 going deposition offered in evidence. Objected to by counsel for State, objection sustained; to which ruling counsel for defendant excepted. Deposition of Mrs. Mary H. Nicodemus and Captain William C. Rivers read for and on behalf of the defendant. Frank L. Sizer and George M. Bourquin, witnesses for and on behalf of defendant were sworn and examined. Jury admonished and excused to 1:30 P. M. Chas. A. Whipple, Nicolas Hilger and Jordan Banks, witnesses for and on behalf of defendant, were sworn and examined. Defendant at this time asks a subpœna for Drs. F. J. Adams and R. P. R. Gordon, and it was so ordered. Jury admonished and excused until 9:30 A. M. to-morrow.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 14TH, 1905.

This day again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond, with his attorneys Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill, and the jury empanelled on a former day came in and took their seats.

George E. Bayha was sworn and examined for and on behalf of the defendant. Exhibit 3, Report of Coroner's Inquest, offered for identification by this witness and received under objection by the State's attorney. O. C. Dallas and Wallace W. Donaldson, witnesses for and on behalf of defendant, were sworn and examined. John S. M. Neill, sworn and examined in part for defendant. Jury ad-

monished and excused to 1:30 P. M. John S. M. Neill further examined for defendant. Mrs. Catherine McDonald, James M.
22 Kennedy, Lloyd Gans, Edward S. Flaherty, G. F. Duncan, Norman Nebergall, Ed. G. Ivans, Geo. C. Van Sickle and Dan Mahoney, witnesses for and on behalf of the defendant, were sworn and examined. Jury admonished and excused to 9:30 A. M. to-morrow. It is ordered that all jurors not sitting in this case be excused to 10 A. M. Thursday, June 22d, 1905.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 15TH, 1905.

This day came again the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond and with his attorneys, Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill; and the jury empenelled on a former day appeared and took their seats.

Thereupon T. B. Hughes, Dempsey Moore, Al. Smith, Joseph Gleason, Wm. Bigelow and Chas. Campbell, were sworn and examined on behalf of defendant. A certain letter press book offered in evidence in connection with evidence of last named witness. Received under objection of counsel for State and read by attorney Walsh for defendant. A letter addressed to Montague White offered in evidence. Objected to by State. Objection overruled, and said letter read by Mr. Walsh. At this time upon request of counsel for defendant and by order of the court, an attachment for the body of D. D. Kellar, a witness for the State, was issued and given to the sheriff for service, said witness having been called by the defense, and not answering, and not having been excused as a witness. By consent of counsel for both sides, the typewritten evidence as
23 given by William Maygar and John R. Parks at former trial of this defendant was introduced and read in evidence by attorney Nolan for the defense, they being unable to be present. It was also further agreed that the testimony of Mr. Maygar from page 97 to page 109, and of Mr. Parks from page 165 to page 184 be left with the stenographer as a part of his record in this case. Jury admonished and court adjourned to 1:30 P. M. Reading of typewritten evidence of John R. Parks as above was resumed. Deposition of George Cope introduced, received and read under the same objection and in the same situation as pertain to all previous depositions read in this case. Mrs. Catherine Keerl and Mrs. Mary Wilson sworn and examined for and on behalf of defendant. Thereafter, the defense offered in evidence from Exhibit 3 a portion of the testimony given by George B. Soule on page 41, beginning at the question "He told him he would pay for it." Objected to by State for various reasons stated. Objection sustained; to which counsel for defendant excepted. Also, was offered in evidence by defendant

from Exhibit 3 part of the testimony of George B. Soule on page 42 beginning "Q. Do you know" etc., and ending at "A. He went out of the front door" etc. Also alleged testimony of said Soule in Exhibit 3 at page 43, beginning with "Q. What, if anything" etc. and ending immediately preceding the next question. Also from said Exhibit, same page, beginning at "Q. What, if anything, did you see" etc. and ending with "Then I came down." To all of which offers State objected for divers reasons stated. Objection was sustained and was excepted to by defendant's counsel. At this
24 time the court announced that he would call the calendar at 9:30 A. M. to-morrow, and for that reason he would excuse the jury to 10 A. M., and the jury having been admonished; it was hereby ordered that the court adjourn until Friday morning, June 16th, 1905, at 9:30 o'clcok.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 16TH, 1905.

This day again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding, who in its behalf prosecute. Came also the defendant in response to his bail bond and with his attorneys Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill; and the jury empanelled on a former day appeared and took their seats. Dr. William Treacy sworn and examined for and on behalf of defendant. By consent other physicians appearing as witnesses were allowed to remain in the court room while a long hypothetical question was propounded to this witness, and then excluded. Ordered that subpœna issue for W. H. McCann as a witness for and on behalf of State. Drs. F. J. Adams and R. P. R. Gordon, witnesses for and on behalf of defendant, were sworn and examined. Jury admonished and excused to 9:30 A. M. to-morrow.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 17TH, 1905.

This day again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also
25 the defendant in response to his bail bond, with his attorneys Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill; and the jury empanelled on a former day came in and took their seats. Thereupon examination of Dr. R. P. R. Gordon, a witness for and on behalf of the defendant, was resumed. Dr. Edwin S. Kellogg,

sworn and examined for and on behalf of defendant. It was agreed between counsel that the hypothetical question heretofore propounded to several witnesses be considered as having been read and understood by this witness, in part. He was allowed to read the remainder of said question and then gave his answer to the same. Ordered that subpœna for F. J. Kenck as a witness for and on behalf of the State be issued, which was done. At this time counsel for defense offered in evidence all the files, records and papers in this case, and the same were received without objection.

Defendant rests.

Thereupon all witnesses for defendant were finally excused, excepting Robert N. Allen, Arthur T. Green, Dan Mumbrue, Mrs. Catherine Keerl and Mrs. Mary Wilson.

Thereafter W. O. Hutchinson sworn and examined for and on behalf of the State. Dr. Chas. H. Head sworn and examined in part for and on behalf of State. Jury admonished and excused to 1:30 P. M. Examination of Dr. Chas. H. Head resumed. Dr. Oscar M. Lanstrum, George F. Goodrich sworn and examined and Wm. Lareau recalled and examined for and on behalf of State. Jury admonished and excused to 9:30 Monday morning.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 19TH, 1905.

26 This day again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond and with his attorneys Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill; and the jury empanelled on a former day came in and took their seats. Whereupon Thomas Travis was recalled and further examined for and on behalf of the State. Dr. B. C. Brooke recalled and further examined in part for and on behalf of the State. Chas. S. Hall sworn and examined in part for and on behalf of the State. Motion made by defendant's counsel to strike out testimony of this witness for reasons stated. Decision reserved. Jury admonished and excused to 1:30 P. M. Examination of Dr. B. C. Brooke resumed. Court announced that defendant's motion heretofore made to strike out the testimony of Chas. S. Hall was denied, to which ruling counsel for defendant excepted. Jacob A. Yund recalled and further examined for and on behalf of the State. At this time counsel for State offered in evidence three depositions taken on behalf of defendant and not introduced by counsel for defendant. The court took the matter under advisement. Frank Kenck recalled and further examined for and on behalf of the State. Duncan McDonald sworn and examined for and on behalf of the State. Jury admonished and excused to 9:30 A. M. to-morrow.

(Title of Court.)

No. 387.

JUNE 20TH, 1905.

This day again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond and with his attorneys Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill; and the jury
27 empanelled on a former day came in and took their seats. Whereupon court announced he would sustain objection of counsel for defendant to receiving in evidence of the three depositions offered yesterday by the State, namely those of Joseph Heinsberger, Frank Fredericks and H. D. Thatcher. Examination of Duncan McDonald resumed. Joseph H. Smith, Herman F. Lidolph, Leonard Bailey, John D. McLeod and John Gilman Bullard, witnesses for and on behalf of the State, were sworn and examined. A. S. Hovey sworn and examined in part for and on behalf of the State. Jury admonished and excused to 1:30 P. M. Examination of A. S. Hovey resumed. J. G. Jones, Jeff O'Connell, Terrance O'Donnell, Ed. S. Walker and Jos. C. Murray were sworn and examined for and on behalf of the State. At this time counsel for State offered in evidence the deposition of Geo. H. Scott, one of the files in this case. Objected to by defendant. Objection sustained. State's counsel also offers in evidence portions of depositions heretofore offered in evidence by State and excluded on motion of defendant. Taken under advisement by the court. Jury admonished, and it is ordered that court adjourn until Wednesday morning June 21st, 1905, at 9:30 o'clock.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 21ST, 1905.

Again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding who in its behalf prosecute. Came also the defendant in response to his bail bond, and with his attorneys Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill, and the jury em-
28 panelled on a former day came in and took their seats.

Whereupon counsel for State, referring to portions of depositions offered in evidence yesterday, now designated said portions. Counsel for defendant objected to the reception of the matter in said portions for divers reasons stated; objection sustained; to which State's attorney took exception. Thereafter Dr. Chas. T. Sweeney was sworn and examined in rebuttal for and on behalf of the State.

State rests.

Defendant's counsel at this time moves the court to strike out the testimony of witnesses, Jeff O'Connell, Thomas Travis, Ed. S. Walker, Jos. C. Murray, Chas. S. Hall, J. D. McLeod, A. S. Hovey, Gilman Bullard, Jacob Yund, H. F. Lidolph and F. J. Kenck. Mrs. Catherine Keerl recalled and further examined for and on behalf of defendant in surrebuttal. Jury admonished strictly and excused to 9:30 A. M. to-morrow.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 22ND, 1905.

This day again came the State of Montana by Messrs. R. W. Berry and C. A. Spaulding, who in his behalf prosecutes. Came also the defendant in response to his bail bond, with his counsel, Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill, and the jury empanelled on a former day appeared and took their seats. Thereupon the court read his instructions to the jury; and arguments of counsel were begun. Jury admonished and excused to 1:30 P. M. Arguments of counsel resumed. The arguments to the jury not being concluded, the jury was admonished and it was ordered that
29 court adjourn until Friday morning, June 23d, 1905, at 9:30 o'clock.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 23D, 1905.

This day again came the State of Montana, by Messrs. R. W. Berry and C. A. Spaulding, who in its behalf prosecutes. Came also the defendant in response to his bail bond, and with his attorneys, Messrs. T. J. Walsh, C. B. Nolan and W. M. Cockrill; and the jury empanelled on a former day came in and took their seats. Thereupon counsel continued their arguments to the jury; and having concluded them, the jury retired to consider their verdict in charge of E. J. Emmett, a sworn bailiff. Thereafter on the same day the jury returned into court with their verdict, which was as follows:

STATE OF MONTANA, Plaintiff,
vs.
JAMES S. KEERL, Defendant.

Verdict.

Upon the defendant's second plea that he has been acquitted of every grade of the offense charged in the information in this case,

by the judgment or order of *of* the district court of the First Judicial District of the State of Montana, in and for Lewis and Clarke county, rendered on the 14th day of July, 1904, We, the jury, find for the State.

J. F. DONEHER,
Foreman of the Jury.

STATE OF MONTANA, Plaintiff,
vs.
JAMES S. KEERL, Defendant.

Verdict.

Upon the defendant's fourth plea that he was acquitted
30 of the highest grade of the offense charged in the information, to-wit: Murder in the first degree, by the judgment of the district court of the First Judicial District of the State of Montana, in and for Lewis and Clark county, rendered on the 5th day of June, 1903, and upon the fifth plea that he was once in jeopardy for the highest grade of the offense charged in the information, to-wit: Murder in the first degree, by the judgment of the First Judicial District Court of the State of Montana, in and for the county of Lewis and Clark, rendered on the 5th day of June, 1903, we, the jury, find that the defendant was in jeopardy and acquitted of said highest grade of murder in the first degree by said judgment.

J. F. DONEHER,
Foreman of the Jury.

STATE OF MONTANA, Plaintiff,
vs.
JAMES S. KEERL, Defendant.

Verdict.

We, the jury, find the defendant guilty of manslaughter and leave his punishment to be fixed by the court.

J. F. DONEHER,
Foreman of the Jury.

At the request of counsel for defendant, the defendant being present, the jury was polled and in response to the question as to whether this was their verdict, each and all answered "Yes." Ordered that defendant be remanded to the custody of the sheriff and that his bail bond be exonerated. The court expressed his thanks and appreciation to the jury for their faithfulness and attention during the trial, and the jury was thereupon discharged from further service in said cause.

31 (Title of Court.)

No. 387.

(Title of Cause.)

JUNE 26TH, 1905.

This being the time for the pronouncing of sentence the defendant appeared in custody of the sheriff, whereupon counsel for the defendant asked for leave to consult with his client for a few minutes before sentence should be given, and the matter of pronouncing sentence was thereupon continued to 9:30 A. M. to-morrow.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 27TH, 1905.

Pursuant to the continuance of yesterday, the matter of pronouncing sentence on the defendant in the above entitled cause came on to be disposed of this day, the defendant appearing in the custody of the sheriff and with his counsel, W. M. Cockrill, Esq., and the State being represented by R. W. Berry, Esq., whereupon, the defendant being asked if he had anything to say why sentence should not be pronounced upon him at this time, replied that he had not. Thereupon counsel for defendant asked and was granted leave to make a few remarks to the court, which being concluded, it was ordered and adjudged that the defendant be remanded to the custody of the sheriff to be by him delivered to the authorities of the state's prison, there to be confined at hard labor for the period of ten years. Thereupon counsel for defendant gave notice of appeal to the supreme court, and asked the court for a certificate of probable cause; to the granting of which the attorney for the State objected, and the court took the matter under advisement, at the same
32 time ordering that defendant be remanded to the custody of the sheriff to await the further order of the court.

(Title of Court.)

No. 387.

(Title of Cause.)

JUNE 28TH, 1905.

The State having withdrawn its objection to certificate of probable cause, the court signed and delivered such certificate, as follows:

No. 387.

STATE OF MONTANA, Plaintiff,
vs.
JAMES S. KEERL, Defendant.

Certificate of Probable Cause.

It appearing to the undersigned, the Judge of said court, that the defendant in the above entitled cause has appealed to the supreme court of the State of Montana from the judgment of conviction of this court herein made and entered on the 27th day of June, 1905, I, the undersigned, hereby certify that in my opinion there is probable cause for the appeal.

Done at Great Falls, Montana, this 27th day of June, 1905.

J. B. LESLIE, *Judge.*

Defendant moves the court to be admitted to bail; and the State objects to any order admitting defendant to bail after having been convicted and sentenced, and thereupon bail was denied.

33 *Instructions Requested by the Defendant and Refused or Modified by the Court.*

1. Under the law of this state certain persons, including lunatics and insane persons, are incapable of committing crimes. Accordingly, if you find that at the time of the doing of the acts charged in the information against the defendant, he was an insane person, it is your duty to acquit him.

(Endorsed:) Given as modified. J. B. L., J.

You are instructed that by reason of the discharge of the jury on the former trial of this cause before they had agreed and before it appeared that there was no reasonable probability that they would agree, as disclosed by the record of the proceedings heretofore had in this cause the defendant has been acquitted of the crime charged against him by the information herein, it will be your duty to so find.

(Endorsed:) Refused. J. B. L., J. Cockrill & Greene, C. B. Nolan, and T. J. Walsh, Defendant's Att'ys.

You are instructed that under the evidence submitted the defendant is entitled to a verdict in his favor on his plea of former acquittal of the crime of murder in the first degree, and that it is your duty to so find.

(Endorsed:) Given in substance. J. B. L., J. Cockrill & Greene, C. B. Nolan, and T. J. Walsh, Defendant's Attorneys.

34 It is not necessary that the defendant should have been insane continuously for any length of time prior to the commission of the acts charged against him in the information, in order that he should be exempt from criminal responsibility for it; nor is it necessary that all the faculties of his mind should be destroyed perverted or impaired. If by reason of disease affecting his mind his mental faculties were so impaired or perverted as that he was unable to distinguish between right and wrong as to the particular act with which he was charged; or if he was unable to recognize that it was wrong and yet was impelled by some insane impulse originating in disease to the commission of the act, and he was unable, by reason of the diseased condition of his mind enfeebling his will, or otherwise, to refrain from its commission, he should be acquitted.

(Endorsed:) Given as modified. J. B. L., J.

5. If you entertain a reasonable doubt as to the sanity or insanity of the defendant at the time of the commission of the act charged against him, it is your duty to render a verdict of not guilty, and if you reach such a verdict upon the ground of insanity of the defendant, you will find and report such fact by your verdict that further proceedings may be taken in the premises as provided by law.

(Endorsed:) Refused—but given as modified. J. B. L., J.

7. Although the information charges, or attempts to charge
35 the defendant with the commission of murder in the first degree, you are instructed that by reason of proceedings heretofore had in this cause, you cannot find him guilty of murder in the first degree, or of any offense graver than murder in the second degree.

(Endorsed:) Given as modified. J. B. L., J.

8. Manslaughter is defined by the statute as the unlawful killing of a human being without malice. It is of two kinds, voluntary, upon a sudden quarrel or heat of passion; involuntary, in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution or circumspection. If, therefore, you find that the defendant killed the deceased unlawfully, but without malice and upon a sudden quarrel or heat of passion and you also find he was not insane at the time, you cannot find him guilty of any crime greater than manslaughter.

(Endorsed:) Given in substance. J. B. L., J.

No. —. Where two witnesses testify directly opposite to each other on a material point, and they are the only ones who testify directly to the same point, you are not bound to consider the evidence evenly balanced, or the point not proved; you may regard all the surrounding facts and circumstances proved on the trial and give credence to one witness over the other, if you think such facts and circumstances warrant it.

(Endorsed:) Given as modified. J. B. L., J.

36 No. —. The burden of proof is upon the prosecution to establish every material allegation of the information in this case to your satisfaction beyond a reasonable doubt.

The defendant is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown he is entitled to an acquittal.

(Endorsed:) Given as modified. J. B. L., J.

No. —. A reasonable doubt is not such a doubt as a man may start by questioning for the sake of a doubt, nor a doubt suggested or surmised without foundation in the facts or testimony. It is such a doubt only as in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of the highest and gravest importance, prevents the jury from coming to a conclusion in which their minds rest satisfied. If in so using the mind and considering all the evidence produced, it leads to a conclusion which satisfies the judgment and leaves upon the mind a settled conviction of the truth of the fact, it is the duty of the jury to declare the fact by their verdict.

It is possible always to question any conclusion derived from testimony, but such questioning is not what is termed a reasonable doubt. A reasonable doubt exists only in that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

37 A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not what is denominated a reasonable doubt. A juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to a possible state of facts differing from that established by the evidence; you are not at liberty to disbelieve as jurors if you believe as men; your oath imposes upon you no obligation to doubt where no doubt would exist if no oath had been administered.

(Endorsed:) Given as modified. J. B. L., J.

Instructions of the Court to the Jury.

(Title of Court.)

(Title of Cause.)

No. 1. The defendant James S. Keerl is charged by information with the crime of murder, in that he did shoot and kill one Thomas Crystal, alleged to have been committed in the county of Lewis and Clark and State of Montana on or about the 11th day of April, 1902. To this information the defendant has entered, among other pleas, the plea of not guilty, and by such plea he pleads that he is not guilty of any crime charged in said information, and he thereby puts

in issue and denies each and every material allegation of the information, and you are instructed that all of the allegations in said information are material.

No. 2. No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of the killing by the person as alleged are established as inde-
38 pendent facts; the former by direct proof, and the latter beyond a reasonable doubt.

No. 3. In order to convict the defendant of any crime you must be satisfied that he acted, if you find that he acted at all, feloniously, which means with a guilty mind and evil heart.

No. 4. Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed amounts to manslaughter, or that the defendant was justifiable or excusable.

No. 5. You are instructed that your power of judging of the effect of the evidence is not arbitrary, but it is to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds.

No. 6. You are the sole and exclusive judges of the facts in this case and of the credit to be given to the respective witnesses who have testified. In passing upon the credibility of the witnesses you have a right to take into consideration their prejudices and motives, if you believe that any such have been shown or proven by the evidence in the case. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or his motives, or by
39 contradictory evidence; and you are the exclusive judges of the credibility of the witnesses.

No. 7. You are instructed that you are not at liberty to disregard the evidence of any witness who has not been impeached, and that if any fact has been testified to by any witness who has not been impeached and there is nothing inherently improbable in the statement nor anything in the manner or appearance of the witness to cause his testimony to be discredited, you are bound to consider such fact as established and to take it into consideration in forming your verdict.

No. 8. You are not at liberty to assume the existence of any state of facts unless there is evidence in the case justifying the conclusion; nor can any member of the jury act on any knowledge he may have of the facts, or on any information he may have acquired from any source other than from the evidence adduced at the trial.

No. 9. The law presumes the defendant innocent until he is proven guilty beyond a reasonable doubt. This presumption of innocence should continue and prevail, throughout the trial of this

case, in the minds of the jury until they are satisfied by the evidence, beyond all reasonable doubt, that the defendant is guilty as charged.

No. 10. A reasonable doubt is not such a doubt as any man may start by questioning for the sake of a doubt; nor a doubt suggested or surmised without foundation in the facts or testimony. It
40 is such a doubt only as, in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of importance, prevents the jury from coming to a conclusion in which their minds rest satisfied. If so using the mind and considering all the evidence produced, it leads to a conclusion which satisfies the judgment and leaves upon the mind a settled conviction of the truth of the fact, it is the duty of the jury so to declare the fact by their verdict. It is possible always to question any conclusion derived from testimony, but such questioning is not what is a reasonable doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge.

No. 11. The law presumes that a person intends the ordinary consequences of his voluntary act, and that an unlawful act was done with an unlawful intent. These are what are denominated disputable presumptions, however, and may be rebutted by other evidence. This law also presumes a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another. This presumption is deemed conclusive. A presumption is a deduction which the law expressly directs to be made from particular facts.

No. 12. The word "Malice" and "Maliciously," as used in these instructions, import a wish to vex, annoy or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

No. 13. By "wilful" is meant simply a purpose or willingness to commit the act complained of.

41 No. 14. Murder is the unlawful killing of a human being with malice aforethought.

No. 15. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

No. 16. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree and all other kinds of murder are of the second degree.

No. 17. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

(1) Voluntary, upon a sudden quarrel or heat of passion.

(2) Involuntary, in the commission of an unlawful act, not

amounting to felony; or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution or circumspection.

No. 18. To make the killing either murder or manslaughter, it is requisite that the party die within one year and a day after the stroke received or the cause of death administered; in the computation of which the whole of the day on which the act was done shall be reckoned the first.

42 No. 19. It is always essential in both grades of murder—murder in the first and second degrees—that malice aforethought shall exist. If the killing be unlawful, but done without malice, it is manslaughter only; but if the killing be unlawful and done with malice aforethought, but without deliberation, it is murder of the second degree; if the killing be unlawful and done with malice aforethought and with deliberation and premeditation it is murder of the first degree.

No. 20. If the jury believe beyond a reasonable doubt that the defendant is guilty of an unlawful homicide, you will then determine whether it is murder or manslaughter by the presence or absence of malice afor-thought. If done with malice aforethought, it is murder; if done without malice aforethought, it is manslaughter only.

No. 21. As the court has instructed the jury before, manslaughter is the unlawful killing of a human being without malice either express or implied, either voluntary, on a sudden heat, or involuntary in the commission of some unlawful act, and if you find from the evidence, beyond a reasonable doubt, that the defendant did the killing unlawfully and voluntarily, but in a sudden heat or transport of passion, or involuntarily in the commission of an unlawful act, and without malice express or implied, then the crime would be manslaughter, and you should so find him guilty. As the court has instructed the jury, the crime of murder requires a mind to have acted from deliberation and intelligence, and when it is clouded by a passion which apparently is irresistible in a reasonable person, the killing is only manslaughter. The passion which in

43 law rebuts the imputation of malice so as to reduce the killing to manslaughter need not be so overpowering as for the time to shut out knowledge and destroy volition, but that heated condition of the mind that would render a reasonable man deaf to the voice of reason, so that all the acts done, or likely to produce death, are not the result of malignity of heart, but imputable to human infirmity. There is no necessity that reason should be dethroned, or that the slayer should not in a whirlwind of passion, but there must be a sudden passion upon a reasonable provocation, apparently sufficient to make the passion irresistible.

No. 22. Homicide is justifiable:

(1) When committed by any person in resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person, or,

(2) When committed in the lawful defense of such person, when there is reasonable ground to apprehend a design to commit a felony

or to do some great bodily injury, and eminent danger of such design being accomplished.

No. 23. A bare fear of the commission of any of the offenses mentioned in subdivision 2 of the next foregoing instruction, to prevent which homicide may be lawfully committed, is not sufficient to justify it, but the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone. The homicide appearing to be justifiable or excusable, the person charged upon his trial, must be fully acquitted and discharged.

44 No. 24. Homicide is excusable in the following cases:

(1) When committed by accident or misfortune in lawfully correcting a child or servant, or in doing any other lawful act by lawful means with usual and ordinary caution and without any unlawful intent.

(2) When committed by accident or misfortune in the heat of passion upon any sudden or sufficient provocation, or upon a sudden combat, when no undue advantage is taken nor any dangerous weapons used, and when the killing is not done in any cruel or unusual manner.

No. 25. Although the information in this case charges the defendant with the commission of murder in the first degree, you are instructed that, by reason of proceedings heretofore had in this cause, you cannot find him guilty of murder in the first degree, or of any graver offense than murder in the second degree.

No. 26. You are instructed that if you are satisfied by the evidence, beyond all reasonable doubt, that the defendant, at the time and place alleged in the information, unlawfully, feloniously, wilfully, and of his premeditated malice aforethought, either with or without deliberation, did shoot and kill the said Thomas Crystal in the manner and form and with the means as charged in the information, and at the time of said killing the defendant had formed in his mind a felonious, malicious, wilful, and premeditated design, either with or without deliberation to take the life of the said Thomas Crystal, and that said killing was done by the

45 defendant in furtherance of such design in manner and form as charged in the information, you should find the defendant guilty of murder in the second degree.

No. 27. If you are satisfied by the evidence beyond all reasonable doubt that the defendant, at the time and place described in the information and by means of the instrument or weapon in said information described and in the manner and form as charged in said information, did kill the said Thomas Crystal feloniously, unlawfully and voluntarily, but upon a sudden quarrel or heat of passion, and without malice express or implied and without any justifiable cause or legal excuse therefor, you should find the defendant guilty of manslaughter; and if you have a reasonable doubt concerning any of these facts, you should acquit the defendant of the crime of manslaughter.

No. 28. If you find from the evidence that at some time prior to the shooting, the deceased made an assault upon the defendant of

such character as would naturally and instantly produce in the minds of persons ordinarily constituted the highest degree of exasperation, rage, anger or resentment, rendering the mind incapable of cool reflection, and that before the passion so engendered had time to cool so as to permit the defendant to deliberate and reflect with calmness, and because of such provocation and acting under the influence of such passion and without malice, he shot the deceased, he would be guilty of no grade of homicide greater than manslaughter, even though he were sane at the time he shot the deceased.

46 No. 29. No precise time in hours and minutes is or can be declared to be sufficient within which the passions must be held to have subsided and reason have resumed its control so as to render a killing murder and not manslaughter. Men's temeperaments vary greatly as to the duration of hot blood. The question is one of reasonable time, depending upon all the circumstances of the particular case.

No. 30. If you find from the evidence that the defendant did take the life of Thomas Crystal by the means described in the information, and you are satisfied beyond a reasonable doubt that he was not insane at the time, but you also find that the killing was done in the heat of blood or passion, upon a sudden quarrel, and upon reasonable provocation, and without malice express or implied, and you further find that it was not excusable or justifiable, he cannot be found guilty of any grade of homicide greater than manslaughter.

No. 31. If you shall believe beyond a reasonable doubt from all the evidence in this case that the defendant is guilty of a public offense involved in this prosecution and as herein defined to you, and you have a reasonable doubt as to whether he is guilty of murder in the second degree or manslaughter, it will be your duty to give the defendant the benefit of the doubt and find him guilty of manslaughter only. Likewise, if you have a reasonable doubt as to whether the defendant is guilty of the crime of manslaughter or not guilty, it will be your duty to return a verdict in favor of the defendant of not guilty.

No. 32. If you have a reasonable doubt of the defendant
47 having been proved guilty of any offense, it will be your duty to acquit him.

No. 33. The defendant, under the information in this case, could, if the evidence in your opinion warrants it, be convicted of murder in the second degree, or manslaughter, or acquitted.

No. 34. In every crime of public offense there must exist a union of act and intent, or criminal negligence, and you are instructed that the element of criminal negligence does not enter into this case. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.

No. 35. Under the laws of this State, lunatics and insane persons are incapable of committing crime. In law they cannot be guilty of deliberation, premeditation, malice, or act with wilfulness. The

term "insane persons" as above used, means persons afflicted with insanity; and "insanity" means any defect, weakness or disease of the mind rendering it incapable of entertaining, or preventing its entertaining, in the particular instance, the criminal intent which constitutes one of the elements of every crime. And in this case the defendant's responsibility for the alleged crime, so far as the defense of insanity is concerned, it is to be determined by his capacity to conceive and entertain a criminal intent in relation to the offense with which he is charged in the information; that is to say,
48 if the defendant at the time the deed for which he is on trial was done, had the mental capacity to conceive and entertain the intent to commit the crime charged in the information, then at that time he was sane within the meaning of the law; if on the other hand, he, at that time, had not the mental capacity to conceive and entertain the intent to commit said crime, he was affected with insanity within the meaning of the law.

No. 36. To have the mental capacity to conceive and entertain the criminal intent referred to in the next foregoing instruction, the person charged with the crime must, at the time of its commission, be so far in the possession of his mental faculties as to have a knowledge of right and wrong in relation to the act charged and the mental power to choose to do or not to do the act in question, and of governing his conduct in accordance with such choice. If such person at such time did not have the mental capacity to understand or know the right from wrong, or, at the time knowing right from wrong, yet from the overmastering violence of mental disease, did not have the mental capacity to choose between the right and wrong and of governing his conduct in accordance with such choice, he could not have conceived or entertained such criminal intent.

No. 37. You are instructed that if, from all the evidence in the case, you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused in manner and form as charged in the information, and that at the time of the commission of such crime the defendant knew it was wrong to commit such crime, and was mentally capable of choosing either to do or
49 not to do the act or acts constituting such crime and of governing his conduct in accordance with such choice, then it is your duty under the law to find him guilty, even though you should believe from the evedence that at the time of the commission of the crime he was not entirely and perfectly sane.

No. 38. The jury should bear in mind the distinction between the mental disease known as insanity (which the law out of tenderness for human life and liberty deems sufficient excuse for crime) and a wicked impulse of the evil passions. The mind has various attributes or powers; among them are the passions or attributes of revenge, jealousy, hatred, malice and anger. These are attributes of human nature found in a greater or less degree everywhere, and the law requires every sane person to govern them; and if they are permitted to become so strong for any reason as to dominate the will-power of a sane man and impel him to the commission of a wrong, the wrongdoer will be held accountable therefor; but when the mind is un-

sound, as hereinbefore defined, and the hand is impelled to take life, then such insane person is not responsible.

No. 39. It is not necessary that the defendant should have been insane continuously for any length of time prior to the commission of the acts charged against him in the information, in order that he should be exempt from the criminal responsibility for it; nor is it necessary that all the faculties of his mind should be destroyed, perverted or impaired. If, by reason of disease affecting his mind, his mental faculties were so impaired or perverted as that he was unable to distinguish between right and wrong as to the particular
50 act with which he is charged, or, if he was able to recognize that it was wrong and yet was impelled by some insane impulse originating in mental disease to the commission of the act, and he was unable, by reason of the diseased condition of his mind enfeebling his will, or otherwise, to refrain from its commission, he should be acquitted.

No. 40. The law presumes in the first instance that every man is sane, but that is a presumption which may be overcome. It is not necessary that it be established by a preponderance of the evidence that the defendant was insane at the time of the shooting, but if upon all the evidence you entertain a reasonable doubt as to the sanity of the defendant at the time of the commission of the act charged against him, it is your duty under the law to give him the benefit of the doubt and acquit him on the ground of insanity.

No. 41. If you find yourselves unable to determine from the evidence whether the defendant was or was not sane at the time of the shooting, you must acquit the defendant.

No. 42. In considering the question as to whether the defendant was sane or insane at the time he shot the deceased, you are instructed that unless you can harmonize every fact established by the evidence with the theory that he was sane at the time of the shooting it will be your duty to acquit him on the ground of insanity.

No. 43. You are instructed that, under the laws of Montana, no act committed by a person while in a state of voluntary intoxica-
51 tion is less criminal by reason of his being in such a condition. But, whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species of degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.

No. 44. It is provided by our law that "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his being in such a condition." But it will be observed that such intoxication must be *voluntary*. If the defendant drank and became intoxicated not of his own volition, but because of a diseased condition of his nervous system which he had inherited and which created in him an irresistible appetite for intoxicating drink, and in consequence of such desire for alcoholic drink, he drank until he became intoxicated, such intoxication would not be voluntary.

No. 45. In determining whether the killing is murder or man-

slaughter should you be called upon to consider that question, you may take into consideration the intoxication of the defendant, if you believe from the evidence that he was intoxicated at the time of the shooting, as well as provocation, if any is shown, for the purpose of reaching a conclusion as to whether the killing was the result of a heat of passion; and if you find this to be the case you cannot convict the defendant of any higher grade of homicide than manslaughter.

No. 46. Drunkenness is a temporary state of the mind due to imbibing alcoholic liquors in which the normal action of
52 the mental faculties is disturbed. Insanity is a diseased condition which manifests itself in irregular mental action without reference to the intoxication of the subject. It is in evidence that the drinking of alcoholic liquors may and sometimes does cause insanity, but insanity caused by the drinking of alcoholic liquors as distinguished from mere drunkenness will render one incapable of the commission of crime the same as insanity produced by any other cause. Accordingly, if you find that at the time of the commission of the act charged against the defendant he was insane, it is your duty to acquit him, though you believe that his insanity was caused by the use of or overindulgence in intoxicating liquors.

No. 47. If you believe from the evidence that the defendant was afflicted with an insane and irresistible desire to drink originating in a diseased condition of his nervous system, due to inheritance, and you find that by reason of such insane and irresistible desire so originating he drank intoxicating liquors until he became intoxicated to such an extent as that he was unable to distinguish between right and wrong as to the particular act charged against him; or if he was able to so distinguish he was impelled by an insane and irresistible impulse to the commission of it, he is not criminally liable and should be acquitted on the ground of insanity.

No. 48. If the defendant was insane at the time of the commission of the act charged against him, he should be acquitted even though you should also find that he was drunk. If, by reason of the diseased condition of his mind, the defendant could not be held answerable for the killing of the deceased had he been sober,
53 he cannot be held answerable for it, because he was drunk when he did it, if you should find that he was drunk.

No. 49. If the defendant at the time of the killing, although not insane was in such condition of mind, by reason of drunkenness, as to be incapable of forming a specific intent to kill, or to do the act that he did do, the grade of his crime would be reduced to manslaughter.

No. 50. A killing which is intentional and unlawful, but wholly from passion inflamed by intoxication, and an imaginary insult, without that degree of thought essential to malice, amounts only to voluntary manslaughter.

No. 51. A defendant in a criminal action may be sworn and may testify in his own behalf, or he may decline to do so. If the defendant does not claim the right to be sworn, or does not testify, it must not be used to his prejudice by the jury.

No. 52. In addition to the plea of not guilty, the defendant has pleaded in substance that he has been acquitted of every grade of the offense charged in the information, by the judgment or order of the district court of the First Judicial District of the State of Montana in and for the county of Lewis and Clark on the 14th day of July, 1904, by the alleged premature discharge of the jury then impanelled in this cause therein, then pending. This plea is denominated defendant's second plea. You are instructed to return a verdict in favor of the State as to this plea.

54 No. 53. You are further instructed to return a separate verdict finding that the defendant was placed in jeopardy and acquitted of the highest grade of the offense charged in the information, to-wit: murder in the first degree, by the judgment of the district court of the First Judicial District of the State of Montana in and for Lewis and Clark county on the 5th day of June, 1903.

No. 54. You are instructed that when you retire to consider of your verdict, it is important, and you are directed to remain together at all times in charge of the bailiff until you have rendered your verdict in open court or shall have been discharged by the court from further service in this cause.

No. 55. You are instructed that if you should find the defendant not guilty on account of insanity, your verdict should be "Not guilty by reason of insanity."

No. 56. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for not less than ten years, which may be extended to life imprisonment.

No. 57. Manslaughter is punishable by imprisonment in the state prison not exceeding ten years; that is to say, by imprisonment for any period from one day to ten years.

No. 58. If the jury should find the defendant guilty, you have the right to fix his punishment or you may leave his punishment to be fixed by the court.

No. 59. When you retire to your room you should choose
55 one of your number as foreman, and he should sign any verdict upon which you may agree.

Amongst the papers handed you you will find blank verdicts which will be suitable to such finding you may make.

No. 60. It requires the concurrence of your entire number to make a verdict.

J. B. LESLIE, *Judge.*

(Endorsed:) Filed June 24th, 1905.

56 In the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade, June Term, A. D. 1905.

Present: Hon. J. B. Leslie, Judge.

THE STATE OF MONTANA
against
JAMES S. KEERL.

Conviction of Manslaughter.

The county attorney, with the defendant and his counsel, W. M. Cockrill, came into court. The defendant was duly informed by the court of the nature of the information found against him for the crime of murder in the first degree committed on the 11th day of April A. D. 1902, of his arraignment and plea of "Not guilty as charged in said information," of his trial and the verdict of the jury on the 23d day of June, 1905, "Guilty of manslaughter." The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none. And no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment: That whereas the said James S. Keerl having been duly convicted in this court of the crime of manslaughter,

It is therefore ordered, adjudged and decreed, that the said James S. Keerl be punished by imprisonment in the state penitentiary, of the State of Montana, at hard labor, for the term of ten years.

57 The defendant was then remanded to the custody of the sheriff of the county of Cascade, State of Montana, to be delivered by him into the custody of the proper officers of said state penitentiary.

J. B. LESLIE, *Judge.*

Office of the Clerk of the Eighth Judicial District Court, State of Montana, in and for the County of Cascade.

I, C. C. Prcotor, Clerk of the District Court aforesaid to hereby certify the foregoing to be a full, true and correct copy of the judgment duly made and entered on the minutes of the said District Court in the above entitled action, and that I have compared the same with the original, that the same is a correct transcript therefrom and of the whole thereof.

Attest: my hand and the seal of said District Court, this 27th day of June, A. D. 1905.

C. C. PROCTOR, *Clerk,*
By C. E. KRETLOW, *Deputy Clerk.*

58 In the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade.

No. 387.

STATE OF MONTANA, Plaintiff,
vs.
JAMES S. KEERL, Defendant.

Bill of Exceptions.

Filed October 2nd, 1905.
C. C. PROCTOR, *Clerk*,
By C. E. KRETLOW, *Deputy Clerk.*

59 In the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade.

STATE OF MONTANA, Plaintiff,
v.
JAMES S. KEERL, Defendant.

Bill of Exceptions.

Be It Remembered, in the above entitled cause, on the 24th day of April, 1902, a motion for leave to file an information was presented to the district court of the First Judicial District of the State of Montana, in and for the county of Lewis & Clark, by the county attorney of said county, which motion in words and figures is as follows, to-wit:

(Title of Court.)

(Title of Cause.)

Motion.

To the Honorable District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke:

I. O. W. McConnell, county attorney in and for Lewis and Clarke county, State of Montana, do hereby make application to this Honorable Court for leave to file an information against James S. Keerl, charging him with the crime of murder in the first degree committed in Lewis and Clarke county, State of Montana, on or about the 11th day of April, A. D. 1902.

60 Dated this, the 24th day of April, A. D. 1902.

O. W. McCONNELL,
County Attorney of Lewis and Clarke County, Montana.

On said motion, leave was granted to file an information, which said information so filed pursuant to the leave granted, is as follows:

(Title of Court.)

(Title of Cause.)

Information.

In the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke, on this the 24th day of April, A. D. 1902, in the name and on behalf and by the authority of the State of Montana, James S. Keerl is accused by the county attorney of Lewis and Clarke county, Montana, by this information of the crime of murder in the first degree, committed as follows:

That, at the county of Lewis and Clarke, in the State of Montana, on or about the 11th day of April, A. D. 1902, and before the filing of this information, the said James S. Keerl did, wilfully, unlawfully, feloniously, and of his deliberately premeditated malice aforethought, make an assault upon one Thomas Crystal, a human being, and a certain pistol, commonly called a revolver, which was then and there loaded with gun powder and leaden bullets, and by him, the said James S. Keerl, had and held in his right hand, he, the said James S. Keerl, did then and there wilfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought shoot off and discharge at, upon and into the body of said Thomas
61 Crystal, thereby and by thus striking the said Thomas Crystal with the said leaden bullets, inflicted upon the said Thomas Crystal certain mortal wounds in the back, side and head of the said Thomas Crystal (a more particular description of which said mortal wounds is to the county attorney unknown) of which said mortal wounds the said Thomas Crystal did then and there languish, and languishing did live, and thereafter, on the 21st day of April A. D. 1902, at the county of Lewis and Clarke in the State of Montana, the said Thomas Crystal died; and so the said James S. Keerl did, in manner and form aforesaid wilfully, unlawfully, feloniously, and of his deliberately premeditated malice aforethought, kill and murder the said Thomas Crystal; all of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State of Montana.

O. W. McCONNELL,
County Attorney for Lewis and Clarke County, State of Montana.

STATE OF MONTANA,
County of Lewis and Clarke, ss:

O. W. McConnell, being first duly sworn according to law, deposes and says: That he is the duly elected qualified and acting county attorney of Lewis and Clarke county, State of Montana, that he has

read the foregoing information, made by him as complainant, and knows the contents thereof, and that the facts, matters and things therein stated are true to the best of his knowledge, information and belief.

O. W. McCONNELL.

62 Subscribed and sworn to before me this 24th day of April, A. D. 1902.

[NOTARIAL SEAL.] J. L. CALLAHAN,
Notary Public in and for Lewis and Clarke County, State of Montana.

No Bail.
HENRY C. SMITH, *Judge.*

Endorsed on the back: (Title of Court and Cause.) Information for murder in the first degree. Witnesses: J. C. Murray, Franz Fredericks, H. D. Thatcher, John Heinzberger, George Soule, M. H. Bryan, G. H. Scott, B. Hepner, A. Ascheim, Chas. N. Duffy, Frank Kenck, Gsutave Nissem, Ed. Byers, Adam Valles, Wm. Lareau, Thomas Travis, N. Salvaile, B. C. Brooke. Presented in open court and filed by leave of court this the 24th day of April, A. D. 1902. Finlay McRae, Clerk, By Geo. O. Bayha, Deputy Clerk. O. W. McConnell, County Attorney of Lewis and Clarke County, Montana. Recorded in Information Book C—Page 127.

Thereafter, on the 28th day of April, 1902, the defendant filed a motion to vac-te and set aside the order granting leave to file information to vacate and set aside the order of arrest, to direct the discharge of the defendant from custody and to quash and set
63 aside the information, which said motion in words and figures is as follows:

(Title of Court.)

(Title of Cause.)

Comes now the defendant above named and moves the court to vacate and set aside the order herein heretofore made granting leave to file the information herein against the defendant for that no evidence was offered or submitted to the court, in support of the application of the county attorney to file the said information, but the said order was made upon the mere motion of the county attorney.

The defendant further moves the court to vacate and set aside the order of arrest herein and that he be discharged from custody, for that the information under which he is held to answer is not supported by oath or affirmation except as the same appears to be sworn to by the county attorney, "to the best of his knowledge, information and belief," wherefore he is deprived of his liberty without due process of law.

The defendant further moves that the information herein be quashed and set aside for that the same is not supported by oath or

affirmation except as the same appears to be sworn to by the county attorney on information and belief, for which reason to require the defendant to answer to the said information or to hold him to answer theret- would be to deprive him of his liberty without due process of law.

C. B. NOLAN &
T. J. WALSH,
Defendant's Attorneys.

Said motion came on duly to be heard and was denied, to which ruling of the court in denying said motion, the defendant duly excepted.

64 Thereupon, the defendant entered his plea of "Not guilty" and being put upon trial therefor the jury, on the 3d day of June, 1903, returned a verdict of murder in the second degree. The judgment of conviction entered thereon was reversed by the supreme court and the cause coming on for trial the second time the jury disagreed.

That thereafter, and on the 21st day of July, 1904, and prior to the third trial of defendant, the information by leave of court had and obtained was amended by interlineation, said information as amended being contained in the judgment roll herein, and to avoid repetition is not inserted in this Bill of Exceptions.

And the cause coming on for trial the third time the defendant, on the 5th day of June, 1905, entered a plea of not guilty and also interposed a plea of former acquittal of murder in the first degree by reason of the conviction of the defendant on the 3d day of June, 1903, under said information, of murder in the second degree, and also a plea of once in jeopardy and former acquittal, in that upon a former trial of said cause in the district court of Lewis and Clarke county the jury, to whom was submitted said cause, was improperly discharged, which improper discharge operated as an acquittal of the defendant, and reference is hereby made to said plea and the proceedings had thereon. To the foregoing pleas the State served and filed a motion to strike out said special pleas in words and figures following, to-wit:

In the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade.

(Title of Cause.)

65 Comes now the State of Montana and moves the court to reject and strike out the second plea of the defendant herein made and entered on the 5th day of June, 1905, and the whole thereof, upon the ground and for the reason that the same does not substantially or otherwise conform to the statute in such case made and provided.

Comes now the State of Montana and moves the court to reject and strike out all of the third plea of the defendant herein, made

and entered on the 5th day of June, 1905 from and after the figures "1903" in line 5 of said third plea, upon the ground and for the reason that the same does not substantially or at all conform to the statute in such case made and provided.

Comes now the State of Montana and moves the court to reject and strike out all of the fourth plea of the defendant herein, made and entered on the 5th day of June, 1905, from and after the figures "1903" contained in line 6 of said fourth plea, upon the ground and for the reason that the same does not substantially or at all conform to the statute in such case made and provided.

R. W. BERRY AND
C. A. SPAULDING,
Attorneys for State of Montana.

Filed June 6, 1905.

That thereafter said motion to strike out said special pleas was by the court overruled and denied and thereupon the State filed to said pleas the following replication:

(Title of Court.)

(Title of Cause.)

STATE OF MONTANA, *County of Cascade, ss:*

Reply of the State of Montana to the second, third, fourth
66 and fifth pleas of the defendant, made and entered herein on the 5th day of June, 1905.

Replying to the second plea of defendant, made and entered herein on the 5th day of June, 1905 that he has been acquitted of the offense of murder in the first degree charged in the information filed in said cause and court, the State of Montana

Denies that said defendant has already or ever been acquitted of the offense charged in said information of the crime of murder; and denies that he has ever been acquitted of the crime of murder in the first degree or any degree;

Admits that the defendant made and entered to the said information, prior to its amendment, had and made on the 21st day of July, 1904, his plea of not guilty, and upon the said information prior to its amendment, and for the crime therein charged, he was tried before a jury duly and regularly empanelled charged and sworn in the district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clark, which said jury returned a verdict against said defendant of murder in the second degree, upon which verdict said last named district court, wherein this cause was then pending, and from which it was removed to this county and court, rendered and entered its judgment against him on the 5th day of June, 1903, adjudging that said defendant was guilty of murder in the second degree, and that thereafter the said defendant made and filed in the district court of the First Judicial District of the State of Montana in and for the county of Lewis and Clark his mo-

tion for a new trial of said cause, which motion was thereafter
67 by said court denied; that thereafter said defendant appealed to the supreme court of the State of Montana from said judgment and from said order denying a new trial herein; and that thereafter said judgment and said order refusing a new trial were by said supreme court reversed and wholly set aside, and said information under which said defendant had been so tried was held by said supreme court to be insufficient to support said conviction and said cause was thereupon remanded to said district court for a new trial; that thereafter in the said district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clark a jury was duly and legally empanelled, charged and sworn to try said cause upon the issues so joined and under said information prior to its amendment had and made on said 21st day of July, 1904, the said court proceeded to hear the testimony in the said cause, and witnesses were sworn and examined on behalf of the State of Montana in chief, and of the defendant, and of the State of Montana in rebuttal, and thereupon, after argument by counsel and being instructed by the court, the said jury retired to deliberate upon their verdict, and having on the 14th day of July, 1904, after the expiration of about twenty-four hours after their retirement to deliberate as aforesaid, returned into court and reported to said court their inability to agree upon a verdict in said cause, and thereupon and on said 14th day of July, 1904, it appearing satisfactorily to said court that there was reasonable probability that said jury could not agree, and after the making and entering of an order by said court in the records of said court in said cause that it satisfactorily ap-
68 peared to said court that there was a reasonable probability that said jury could not agree, said jury was by said court discharged from further consideration of said cause; that at the time said jury was discharged as aforesaid the said defendant was present in court in person and was then and there represented by his counsel who were likewise present in court, and no objection was interposed by said defendant or his said counsel at said time or at all to the discharge of said jury as aforesaid.

The State of Montana further denies that for the reasons or any reasons in said defendant's second plea set forth the defendant ought not again be tried for the offense or for any offense charged in the information herein; and denies that to do so in view of any of the facts set forth in said plea, or otherwise, would be to place him twice in jeopardy for the said offense or any offense contrary to the provisions of the Constitution of the State of Montana, or otherwise, and denies that any judgment of conviction herein or any proceedings further to hold the defendant to answer to the said information or the charge therein or to put him upon trial for the same would be to deprive him of his liberty without due process of the law;

And thereupon R. W. Berry and C. A. Spaulding, prosecuting this case in behalf of the State, in this behalf say:

That by reason of anything therein in the said plea of the said James S. Keerl above pleaded in bar the said State of Montana ought not to be precluded from prosecuting the said information against

the said James S. Keerl, because they say that the said James
69 S. Keerl has not been placed in jeopardy and has not been acquitted of the crime of murder in the first degree, and has not been placed in jeopardy for the offense charged in said information, and this the said R. W. Berry and C. A. Spaulding, for the said State of Montana, are ready to verify.

The State of Montana further denies generally and specifically each and every allegation in said plea of the defendant contained not herein specifically admitted, denied, modified or explained.

Wherefore they pray judgment that the said James S. Keerl may be convicted of the offense in the said information specified.

Replying to the third plea of defendant, made and entered herein on the 5th day of June, 1905, that he has been once placed in jeopardy for the offense charged in the information, the State of Montana

Denies that the defendant has been once in jeopardy or ever in jeopardy or in jeopardy at all for the offense charged in the information in said cause, or for murder in the first degree by being tried for the offense charged in said information in the district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clark at Helena, Montana on the 23d day of June, 1903, or at any other time or place or at all; and denies that said defendant was tried in said district court, or elsewhere or at all, upon said last mentioned date.

But the State of Montana avers that on the 23d day of June 1904 said defendant was placed upon trial and tried in the district court of the First Judicial District of the State of Mon-
70 tana, in and for the county of Lewis and Clark; that at said time and place he interposed upon said trial for the offense charged in said information, prior to its amendment had and made on the 21st day of July, 1904, the plea of former acquittal and once in jeopardy of the crime of murder in the first degree; admits that the issues raised by said plea and by his further plea of not guilty were submitted to the jury under instructions from the court directing the jury upon the evidence to find for the defendant; that said jury upon retiring to consider of their said verdict were unable to agree upon the issues submitted to them and were thereafter duly and legally discharged from further consideration of said cause.

As the allegation in said plea that said jury agreed to render a verdict in favor of defendant on those pleas of former acquittal and once in jeopardy, the State alleges that it has no information or knowledge thereof sufficient to form a belief, and it therefore denies the same.

As to the allegation in said plea that the said jury declined to return their verdict in favor of the defendant on the plea of former acquittal and once in jeopardy of murder in the first degree solely upon the ground that they thought that they were not at liberty to return a verdict upon said plea without likewise returning a verdict upon the plea of not guilty the State of Montana alleges that it has no knowledge or information thereof sufficient to form a belief, and it therefore denies the same.

The State of Montana further denies specifically and gen-
71 erally each and all of the allegations of said third plea not herein specifically admitted, denies, modified or explained.

And hereupon R. W. Berry and C. A. Spaulding, prosecuting this cause in behalf of the State of Montana in this behalf say:

That by reason of anything in the said plea of the said James S. Keerl above pleaded in bar the said State of Montana ought not to be precluded from prosecuting the said information against the said James S. Keerl because they say that the said James S. Keerl has not been placed in jeopardy and has not been acquitted of the crime of murder in the first degree, and has not been acquitted or placed in jeopardy for the offense charged in the information in said action, and this the said R. W. Berry and C. A. Spaulding, for the said State of Montana, are ready to verify.

Wherefore they pray judgment that the said James S. Keerl may be convicted of the offense in the said information specified.

Replying to the fourth plea of said defendant, made and entered herein on the 5th day of June, 1905, that he has already been acquitted of the offense of murder in the first degree charged herein, the State of Montana avers that said defendant was placed on trial on the 18th day of May, 1903, and tried in the district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clark under the information herein, prior to its amendment had and made on the 21st day of July, 1904, and that by reason of said trial a certain judgment was rendered in said cause in said district court on the 5th day of June, 1903 against said
72 defendant wherein and whereby he was adjudged guilty of the crime of murder in the second degree; but the said State of Montana avers the fact to be that thereafter the said defendant made and filed in said district court in said cause his motion for a new trial of said cause, which was thereafter by said court denied; that thereafter said defendant appealed to the supreme court of the state of Montana from said judgment and from said order denying a new trial herein; that thereafter said judgment and said order refusing a new trial were by said supreme court reversed and wholly set aside, and said information under which said defendant had been so tried was by said supreme court held to be insufficient to support said conviction, and said cause was thereupon remanded to said district court for a new trial.

Wherefore, the State of Montana avers and alleges that said defendant was not acquitted of murder in the first degree by said trial and said judgment aforesaid.

Replying to the fifth plea of said defendant, made and entered herein on the 5th day of June, 1905, that he has been once in jeopardy for the offense charged in the information herein, the State of Montana denies that said defendant was tried in the district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clark, or elsewhere, or at all, on the 5th day of June, 1902; but said State of Montana avers the fact to be that said defendant was placed upon trial on the 18th day of May, 1903, and tried in the district court of the First Judicial District of

the State of Montana, in and for the county of Lewis and Clark,
upon the information herein prior to the amendment thereof
73 had and made on the 21st day of July, 1904, and that a cer-
tain judgment was rendered upon said trial against said defendant, wherein and whereby he was adjudged guilty of the crime of murder in the second degree; that thereafter the said defendant made and filed in said district court in said cause his motion for a new trial of said cause, which was thereafter by said court denied; that thereafter said defendant appealed to the supreme court of the State of Montana from said judgment and from said order denying a new trial herein; and that thereafter said judgment and said order refusing a new trial were by said supreme court reversed and wholly set aside, and said information under which said defendant had been so tried was held by said supreme court to be insufficient to support said conviction, and said cause was thereupon remanded to said district court for a new trial.

Wherefore, the State of Montana avers and alleges that said defendant has not been by said judgment aforesaid once in jeopardy for the offense charged in the information herein.

And hereupon R. W. Berry and C. A. Spaulding, prosecuting this cause on behalf of the State of Montana, in this behalf say: That by reason of anything in the said plea of the said James S. Keerl above pleaded in bar, the said State of Montana ought not to be precluded from prosecuting the said information against the said James S. Keerl, because they say that the said James S. Keerl has not been placed in jeopardy and has not been acquitted of the crime of murder in the first degree, and has not been acquitted or placed in jeopardy for the offense charged in the information in said action, and this the said R. W. Berry and C. A. Spaulding, for the said State of Montana, are ready to verify.

Wherefore they pray judgment that the said James S. Keerl may
be convicted of the offense in the said information speci-
74 fied.

R. W. BERRY,
C. A. SPAULDING,
Attorneys for the State of Montana.

Filed June 6, 1905.

Thereafter said defendant filed his rejoinder to said replication in the words and figures following, to-wit:

(Title of Court.)

(Title of Cause.)

The defendant above named for rejoinder to the replication of the state to the special pleas of the defendant herein.

1. Denies that the information originally filed herein was as averred in the replication herein, held by the supreme court to be insufficient to support the conviction had thereon, further than that said information was insufficient to support a conviction for homicide.

2. Denies that the jury before whom the defendant was the second time tried as set forth in the pleas and replication thereto on the 14th day of July, 1904, or at any time reported to the court their inability to agree upon a verdict.

3. Denies that at the time the jury before whom occurred the second trial of this cause was discharged no objection was interposed by the defendant or his counsel to the discharge of the said jury.

4. Denies that the said jury before whom this cause was so tried the second time were unable to agree upon the issue submitted to them of the former acquittal of the defendant of the crime of murder in the first degree or any *any* issue submitted to them.

75 and denies that said jury was duly or legally discharged.

COCKRILL & GREENE,
C. B. NOLAN &
T. J. WALSH,
Attorneys for Defendant.

STATE OF MONTANA, *County of Cascade, ss:*

James S. Keerl being duly sworn says:
That the foregoing rejoinder is true of his own know-edge.

JAMES S. KEERL.

Subscribed and sworn to before me this — day of June A. D. 1905.

W. M. COCKRILL,
Notary Public in and for Cascade County, Montana.

Filed June 7, 1905.

And thereafter the following proceedings were had, to-wit:

GEORGE B. SOULE, in behalf of the State testified as follows:

My name if George B. Soule. I live at Helena, and was living there on the 11th day of April, 1902. At that time I was eighteen years old. I was working at the Milwaukee Beer Hall doing porter work and had been there about two months before the 11th day of April. I worked there until the 17th day of April, shortly after the shooting.

Q. I will ask you to tell the jury the location of the Milwaukee Beer Hall?

Mr. WALSH, attorney for defendant:

We object to the introduction of this testimony and *and*
76 of any testimony in regard to matters averred in the information, upon the ground that it appears from the records in this case, of which the court takes judicial notice, and from the admissions in the replication to the pleas interposed on behalf of the defendant, that the jury last trying this cause were unlawfully discharged by the court, and that said unlawful discharge operated as an acquittal of the defendant of the charge made in the informa-

tion against him, and that to compel him to proceed to trial again would be to place him twice in jeopardy for the same offense, and would deny him the constitutional right not to be twice put in jeopardy for the same offense, and deprive him of his liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The record of the proceedings when the jury was discharged is as follows:

Done in open court, this 14th day of July, 1904.

In this cause, the jury returned this day in open court, the defendant being present in person and by counsel, whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree, court ordered the jury discharged from further consideration of this cause and that the defendant be remanded to the custody of the sheriff of this county and that the sureties upon defendant's bond be, and they are hereby released and exonerated. Court further ordered that having presided at the trial of this cause upon request, that all further proceedings herein be had before the Hon. Henry C. Smith, the judge presiding in this department.

J. M. CLEMENTS, *Judge.*

77 Which objection was by the court overruled, to which ruling the defendant then and there excepted.

Witness continuing: The Milwaukee Beer Hall is located on Main street, Helena. It is a two-story building. It fronts on Main street and the back of it is toward Jackson street. Jackson street is higher than Main street. On Jackson, it is one story high. There is an entrance to the rear from Jackson street. In the lower story of the saloon as you go in there is a mirror screen about half way in front of the door, then there was a bar; the room was about twenty-five feet by fifty and there were two little rooms in the back part of the saloon, one was used for a kitchen and the other for a card room; there was a stairway right at the east end of the bar going upstairs. The bar was located at the north side of the house and there was a foot-rail at the foot of the bar about eight inches high, running the whole length of the bar. There was a cigar case located in front at the west end of the bar and extending to the front of the house. The screen referred to is located between the cigar case and the bar; these were the conditions that existed on the 11th of April, 1902. At the rear of the bar there was a lunch show case and under the bar was the work board where they cleaned the glasses and kept the bar bottles. There was a mirror behind the bar. The bartender at that time was Thomas Crystal and the proprietor was Frank Kenck and I was doing the porter work at that time and attending to the hot lunch. Upstairs there were three rooms. Commencing at the foot of the stair way on the ground floor about half way up the stairway there is a landing and when you come to this land-
78 ing you turn and go south and when you get up to the head of the stairs there is a hallway running north and south and

there is another hallway running east and west with three large rooms, these rooms had openings into each other and also into the hallway. In the front room facing Main street there was a table and chairs and a lounge as near as I can remember; in the middle room there was a piano and table and chairs and I forget whether there was a lounge in that or not; and in the next room, which would be the east room, there was just a table and chairs.

I was doing porter work and attending to the hot lunch on the 11th day of April. I saw the defendant, Mr. Keerl, there on that day, also Mr. Crystal, Mr. Kenck and Mr. Nissem. I saw Mr. Keerl in the saloon about one o'clock; he came in when I saw him with two soldiers and a man dressed in citizen's clothes, and they went upstairs and started to play the piano. They rang the bell after a little, and Crystal sent me up to take the order. When I got there Mr. Keerl asked me if Kenck was down stairs; he said he could get credit from Kenck, but that son of a bitch of a bartender was no good. So they ordered the drinks; Keerl ordered gin fizz, the soldiers ordered beer, and whiskey for the man dressed in citizen's clothes. I went down stairs and got the drinks and Crystal says: "Collect fifty cents." When I delivered them and came to get the pay for them, Mr. Keerl said he believed he had overreached himself, and one of the soldiers told him in the room that he would settle for it; his name was Fredericks. I went down stairs and told Mr. Crystal. He said: "I guess that will be all right. Fredericks will settle for it."

79 They staid up there I should judge about fifteen minutes or half an hour altogether. Then they came down and had a round of drinks at the bar, and in the meantime Keerl got noisy and Crystal asked him to be quiet. They remained a short time longer and they went out. I believe the soldiers and the other man went out first, and as Keerl was going out he had a few words with Mr. Crystal, then he went out and as he was going out he said "Bastard" to Crystal.

The next time I saw him, we heard the piano playing upstairs, about a half hour later, and he rang the bell after he played the piano a while. Crystal says: "Go up and see who it is, if it is him, tell me and I will go up." I went upstairs and seen it was Keerl playing the piano and I went down and told this to Mr. Crystal and he went up. I don't know what took place up there, only I heard a little scuffle, and then Mr. Crystal came down and told me to "go up and take a look at him, he is up there yet, I believe." I went up and I went through the rooms before I found him—the front room, and then I came out of the front room into the hall and I saw Mr. Keerl standing by the back door and he says: "You tell that son of a bitch he is a bastard and I will fix him, I will meet him with a gun." And at that he went out. There were a few seconds probably from the time Crystal went up there until the piano stopped playing. Mr. Crystal was not upstairs any more than a minute altogether. When I saw Keerl upstairs he was wiping his face with a handkerchief. I didn't notice any bruises on his face but there was a little blood if I remember distinctly on his nose.

80 I saw Keerl again about an hour later. I was working in the kitchen with my back to the front and I knew him by his voice when he came in. I turned around and seen him walking up to the bar and I heard him say: "Now I will fix you, you son of a bitch." He had a gun in his hand pointing to Crystal. Mr. Kenck and Mr. Nissem were sitting at the table right at the east end of the bar and Mr. Kenck says, "For Christ's sake, don't shoot. Duck down, Tom." Crystal stepped a few steps ahead and then ducked down and at that instant Mr. Keerl fired his first shot, and then Crystal went way down out of sight behind the bar, and Keerl got up on the footrail leaned over the bar, and fired four or five more shots and then went out.

Q. I wish, Mr. Soule, that you would step around here and show the jury as near as you can how Crystal went down.

Mr. WALSH: We object to that. The witness has explained the matter. I don't know as there is any occasion for dramatizing these things, as I can see. There is no question raised about these matters in any form.

COURT: If they desire it, I suppose they have the right to have it illustrated, if the witness can do so.

Mr. WALSH: If there were any purpose to be subserved.

COURT: I don't know whether there is any dispute about it or not.

Mr. WALSH: Well there hasn't been heretofore.

COURT: You mean in the trial heretofore?

Mr. WALSH: Yes.

COURT: I don't know what transpired.

81 Mr. WALSH: Unless there were some purpose to be subserved—unless there were some controversy——

COURT: Well I don't know upon what principle the state would be deprived of the right of having any act illustrated; if the witness is capable of doing so, he may do so. Let the objection be overruled, if there is an objection.

To which ruling of the court the defendant then and there excepted.

Witness continuing: When I saw him he was walking up to the bar something like this (illustrating). And when he got up to the bar Crystal had ducked down, and he fired the first shot something like that, (illustrating) and after that he got up on the bar in this manner, (illustrating) and fired the rest of the shots as near as I can remember. Before the first shot was fired Crystal walked ahead a few steps and then ducked down, (illustrating) was looking up like that, (illustrating) when Keerl fired the first shot. Crystal walked ahead a couple of steps and ducked down after Kenck had told him to duck down.

When we went behind the bar Crystal was lying on his side—on his right side; his head was up off the floor I should judge about six inches; his head was lying toward the west. There were five or six shots fired. The gun that Keerl had, had a bright barrel and cylinder. There were in the room, besides myself and Crystal, Kenck and Nissem and Keerl and two men standing at the bar. Crystal

was shot three times. The shooting took place in the city of Helena, County of Lewis and Clark, State of Montana.

82 Mr. Keerl is the defendant. The shooting took place on the 11th of April, 1902. After Keerl fired the shots he walked right out of the saloon; he said something as he went out but I did not catch it.

They removed Crystal to the little card room in the back of the saloon and went for the doctor. After the doctor examined him they put him on a stretcher and put him in an ambulance and took him to the Ssisters' Hospital. I saw Crystal at the hospital afterwards about seven days before he died. He died about ten days after he was shot.

(Diagrams were then shown the witness representing the interior of the saloon and the rooms upstairs which were offered in evidence, without objection, after being identified by the witness as correctly representing the objects therein marked.)

Previous to the 11th day of April, 1902, I had known Mr. Keerl about two months and heard him play the piano frequently. The playing on the 11th of April was about the same as the playing at other times. At this time Mr. Keerl was not drunk but he had been drinking; he seemed to handle himself all right. I don't remember that I ever saw Keerl when he was drunk. I don't remember of Keerl playing the piano at any time there when he had not been drinking; he always took a drink or two in the saloon when he played it. About an hour elapsed between the time when Crystal and Keerl had the trouble in the upper story until Keerl came back and shot Crystal. There were three shots that entered Crystal's person. One went through the face, went in one side and came out of the other. Keerl held the gun in his right hand.

83 Cross-examination of Witness by Mr. NOLAN:

WITNESS: I had not got through with the lunch when the defendant came in there about one o'clock accompanied by the two soldiers and the man in citizen's clothes. They went immediately upstairs when they came in. I am certain about that. And the first drink that they had was the drink that they had up stairs when I went up there in response to the bell.

Q. Now, your recollection was different, wasn't it, at the time you testified at the coroner's inquest? I will call your attention to page 41 of this testimony.

Mr. SPAULDING (for State): I object to his referring to this testimony. He has a right to read from anything and ask if he said that; he has not a right to assume that is the testimony. I don't know whether it is or not.

COURT: That is the way, and if he identifies it he may say whether he testified so or not.

Mr. NOLAN: This is the record filed as required by law.

COURT: That is, it is the record of the inquest?

Mr. NOLAN: It is the record of the inquest.

COURT: The orderly way to do, if you want to ascertain whether

he has made different statements at another time or on another occasion, you have the right of course to read from that and ask him whether he did not at that time testify so, and if he desires to see his testimony, identifying it as such he may look and say whether it is or not and if he denies it you may adopt your own course thereafter.

Mr. NOLAN: Do I understand I am within the ruling of
84 the court in prosecuting the investigation as I am prosecuting it?

COURT: I don't know whether your course there is different or not. That is the way, though, to do it. He may read from that and ask him if he did not so testify.

Mr. NOLAN: As I understand it, in a case that went to the supreme court from this county, the supreme court announces the rule that you could ask the witness, independent of any purpose of impeaching him, whether he made the statement or not.

COURT: That is true.

Mr. NOLAN: But simply asking in that way you would not be permitted to impeach him, if you are desirous of impeaching him you have to call his attention to the time and place or to a writing.

COURT: You may ask him independent of the record, if you can ask the question to cover what you concede to be his former testimony, and if his testimony has been reduced to writing and he identifies it as such, he may inspect it himself for the purpose of refreshing his recollection and say whether he did or did not, or if he can answer without inspecting it, it is his duty to do so, and if any controversy arises as to whether he did testify that way or not then you can make use of any record you have, or even refer to other testimony if you have it. I do not see any objection to this mode of examination, though.

Mr. SPAULDING: The method is not objected to—simply the statement of counsel: "I will read from your testimony". That is
85 objectionable. If he wants to prove this is the testimony of this witness, let him do it.

COURT: That might be objectionable, unless the witness concedes it is his testimony. I think we all understand the rule alike with reference to this character of examination.

Q. Well I will read from what purports to be your testimony given at the coroner's inquest, as follows, and ask you if you did not testify as I read——

Mr. SPAULDING: I object to that statement as not warranted by any fact in this case.

COURT: I think myself the statement is hardly warranted. It is all right for you, if you have a document of that kind, to simply ask him the statement as to whether he did not testify so and so, and if he wants to see any testimony that you have, given by him heretofore, he has a right to it.

Mr. NOLAN: I will take an exception to the ruling of the Court.

Q. Did you not testify at the coroner's inquest as follows, in answer to a question put to you as follows:

"Q. Do you remember what time it was when you first saw him there? (Referring to Keerl, the defendant.)

"A. When I first seen him on the 11th was when he came in with two soldiers and another man dressed in citizen's clothes, that was the first time, about one o'clock.

"Q. You may tell what, if anything, you did towards serving any drinks to Mr. Keerl?

"A. I didn't serve anything at that time.

"Q. You didn't take anything upstairs?

"A. I did afterwards. You see they had a round or two of drinks at that time."

WITNESS: A. I don't remember testifying to any such a thing.

86 Q. Now you told me that you went upstairs in response to the bell signal and that Keerl asked you if Kenck was down stairs?

A. Yes sir.

Q. And that you said—you testified here that Keerl said: "That son of a bitch of a Crystal is no good?"

A. He said "that son of a bitch of a bartender was no good."

Q. Bartender! When did you first tell that that language was used? Did you tell it at the coroner's inquest?

A. I don't remember, I don't know whether I did or not tell that. The question wasn't asked at the coroner's inquest.

Q. Did you not testify as follows at the coroner's inquest:

"Q. You may tell what, if anything, you did towards serving any drinks to Mr. Keerl.

"A. I didn't serve anything at that time.

"Q. You didn't take anything upstairs?

"A. I did afterwards. You see they had a round or two of drinks at that time. They were playing on the piano; then the bell rang and Tom Crystal sent me up there to see what they wanted, and he ordered a gin fizz, a whiskey for the man dressed in citizen's clothes and two beers for the soldiers. I went down and got them and took them up there and waited for the pay; and Keerl said he was afraid he had overreached himself, and spoke to one of the soldiers and told him that he had overreached himself and asked him, I guess, if he had any money. There was none of them had any money."

87 WITNESS: Something similar. Might have been, I can't remember.

Q. Did you at that time say this: "Keerl asked me if Kenck was down there; he could get credit from Keck, but that son of a bitch of a bartender was no good? Did you say anything about that at the coroner's inquest ten days after the shooting?

A. I don't know whether I did or not. The question wasn't asked.

Q. Well the question wasn't asked about the drinking, was it? Yet you told about it.

A. Oh, I don't know what questions they asked. I did not say to-day that one of the men came down stairs upon Keerl's saying that he had overreached himself and made a settlement with Crystal down stairs. I testified that he told me in the room that he would settle for the drinks.

Q. Did you not testify as follows, at the coroner's inquest:

"There was none of them had any money; there was one of them came down and settled it up with Tom; he told him he would pay for it."

A. I don't remember that and I don't know whether that is true or not.

Q. Now what was it that Crystal said to you?

A. Well he told me to go up and see who it was and take their order if there was any one there wanting anything; he didn't know who it was when he sent me up; he says: "If it is him tell me and I will go up."

Q. If it is him, tell me and I will go up?

88 A. Yes sir.

Q. Don't you know as a matter of fact he didn't say anything about taking an order at that time, that he simply asked you to go up and see if that is *him* and let him know. Isn't that the case?

A. Oh, I don't remember about that.

Q. And di-n't you so testify at the coroner's inquest?

A. I knew that I was to take an order; I went up there for the purpose of taking an order.

Q. I am asking you if it is not a fact that Crystal said to you, "Go up there and see if it is him and let me know if it is?"

A. No, he says, "go up there and see who it is."

Q. Was that all?

A. No, as near as I can recollect I think he told me to take their order if there was anyone there wanting any, and he says: "If it is him though, tell me and I will go up."

Q. Did you ask him who he had reference to by "him?"

A. No sir.

Q. Did you know who it was?

A. Yes sir, I knew who he meant.

Q. You knew he meant Keerl did you not?

A. Yes sir.

Q. And yet you knew when he said: "Tell me if it is him and I will go up?"

A. Yes sir, I had an idea he meant Keerl.

Q. Did you not testify this way at the coroner's inquest:

"Q. Later on did you see Keerl again?"

89 "A. No sir, I did not see him again until he came in the back way.

"Q. Tell the jury about that.

"A. When I seen him again it must have been about two o'clock, about a quarter of two, or pretty close to two anyway; we heard the piano playing; the bell rang and Crystal sent me up there and he said: 'If it is him tell me and I will go up.' I went up there."

WITNESS: I may have testified something similar to that, but I am not able to tell whether that is true or not.

A. I don't remember of noticing any jar.

Q. Well, is your recollection clear about that, or is that one of the things that you are uncertain about?

A. No, I don't remember about that at all.

Q. You don't remember. Did you not testify this way at the coroner's inquest:

"A. I went up there and Keerl was there, and I told Mr. Crystal that he was up there. At that Mr. Crystal went there.

"Q. What, if anything, did you see or hear that occurred between Mr. Crystal and Mr. Keerl when you went up there?

"A. I never saw anything, but I heard a little s-uffling and it sounded like a little jar or something."

WITNESS: I don't remember testifying to the jar part of it and I don't remember of there being any jar.

Q. Now you say that when you went upstairs when Crystal told you to go there and take a look at him, that he said to you
90 this: "You tell him that he is a son of a bitch, he is a bastard; I will fix him. I will meet him with a gun." This is the language, isn't it?

A. You tell him he is a bas*a*tard.

Q. Is that the language?

A. No. It isn't exactly the language.

Q. Now give me the exact language.

A. He says: "You tell him he is a bastard" Oh, "You tell the son of a bitch he is a bastard and I will fix him, I will meet him with a gun."

Q. You testified about that, didn't you, at the coroner's inquest?

A. Yes, sir, I think I did.

Q. I will ask you if you did not testify this way at that time:

"Q. Did you go up?

"A. I went up then, yes sir.

"Q. What if anything did you see?

"A. Keerl was up there and was wiping his nose a little bit, then he says: "Tell that son of a bitch he is a horse's a—, and I will fix him; I will fix the son of a bitch I will meet him with a gun."

WITNESS: I don't think it is the language. I don't know whether that is true or not. It is possible that might not be true and I am unable to remember how I testified.

Q. It is possible this might not be true?

A. It could be something that was made up.

Q. And it is possible that it may be true also?

A. Well, it might be a mistake; I always remember it as he said "Bastard" instead of Horse's a—.

91 Q. Well, I will call your atention to page 41 of this record, the same being a record of the testimony given at the coroner's inquest over the body of Thomas Crystal and filed with the clerk of the district court of Lewis and Clark county on the 19th day of June, 1902, beginning with the *w*uestion: "You may tell what, if anything, you did towards serving any drinks to Mr. Keerl," and ending with: "He told me he would pay for it."

(The testimony referred to being as follows:)

"Q. You may tell what, if anything, you did towards serving any drinks to Mr. Keerl.

"A. I did not serve anything at that time.

"Q. You did not take anything upstairs?

"A. I did afterward; you see they had a round of drinks at that time. They were playing on the piano, then the bell rung and Tom Crystal sent me up there to see what they wanted and he ordered a gin fizz, a whiskey for the man dressed in citizen's clothes, and two beers for the soldiers. I went down and got them and took them up there and waited for the pay and Keerl said he was afraid he had overreached himself, and spoke to one of the soldiers and told him he had overreached himself and asked him, I guess, if he had any money. There was none of them had any money. There was one of them came down and settled it up with Tom. He told him he would pay for it."

Q. Did you testify as that record discloses?

Mr. SPAULDING: We object to that and move to strike out that portion of the question which contains the gratuitous state-
92 ment of counsel that this is a record of the district court.

COURT: Yes, that fact ought to be shown, if it is a fact, if they concede the fact; otherwise it can be shown.

Mr. SPAULDING: I do not care at this time to admit that this is a record of this or any other court for the purpose of cross-examination of this witness.

Mr. NOLAN: Then I will eliminate my question the portion assuming that this is the record, and we can get Mr. Miller, the clerk of the district court of Lewis and Clark county here to identify it.

The transcript to which the witness' attention was directed and from which the testimony was read, was then marked for identification, and as such was marked as Exhibit 3 and so referred to.

Q. Calling your attention to Exhibit No. 3 and to page 41 thereof, beginning with the question: "You may tell what, if anything, you did towards serving any drinks to Mr. Keerl," and ending: "He told him he would pay for it." I will ask you if that is not the testimony that you gave at the coroner's inquest?

(The purported testimony being as hereinabove set forth when objection was made by Mr. Spaulding to the reference to the transcript as the testimony given at the coroner's inquest.

WITNESS: No, I don't know whether this is true or not.

Q. Well, look at it and tell me whether it is your testimony or not?

A. Why, it is something similar to my testimony, that is all I could say.

93 Q. Well, did you read it so as to be able to tell us about it? Have you read it sufficiently so as to be able to tell?

A. Well, wouldn't that mean I didn't serve anything when I went up to take the order? It is something similar to it, that is all I can say. It might not be true. I am unable to remember my testimony word for word so as to identify it. Where it says: "I did not serve anything at that time." I don't remember making such a statement. It sounds incorrect to me.

Q. I will now call your attention to page 42 of the same exhibit,

Exhibit 3, beginning with the question: "Do you know of anything that passed between Mr. Keerl and Mr. Crystal after the crowd came down stairs?" and ending with the answer: "He went out the front door, they all went out at the same time," and I will ask you whether or not this is not the testimony that you gave at the coroner's inquest?

(The testimony referred to being as follows:

"Q. Do you know of anything that passed between Mr. Keerl and Mr. Crystal after the crowd came down stairs?

"A. I know they had a few words; Keerl got noisy, talked a whole lot, and Crystal motioned to him to stop—he told him to stop or something like that. That was all the words I heard between them.

"Q. Which way did Keerl go out?

"A. He went out the front door; they all went out the same way.")

WITNESS:

A. Well, I cannot say anything more about this than I did to the other, that it is something similar to what I said. I can't
94 remember whether this is true or not; there may be some mistake. I think there may be a mistake where I said: "they all went out at the same time." Outside of that I can't tell whether it is correct or not. It is something similar, that is all I can tell you. I could not tell you whether that is my correct testimony.

Q. I will call your attention to page 43 of the same Exhibit 3, beginning with the question: "What, if anything, did you hear that occurred between Mr. Crystal and Mr. Keerl when they were up there together?" and ending with the answer: "What, if anything, did you do?" and I will get you to state whether or not that wasn't your testimony at the coroner's inquest?

(The testimony referred to is as follows:

"What, if anything, did you see or hear that occurred between Mr. Crystal and Mr. Keerl when they were up there together?

"A. I never saw anything, but I heard a little scuffling. I heard a scuffle and it sounded like a little jar; it sounded like a little scuffling up there that is all.

"Q. What, if anything did you do?

"A. After Crystal came down he says, "Go up and take a look at him, he is up there yet.")

WITNESS:

A. Well it is all true so far as I can see except for that jar. I don't remember that. I don't remember testifying to any jar.

Q. Again calling your attention to the same exhibit, page 43, beginning with the question: "What, if anything, did you
95 see?" and ending with the sentence "Then I came down," marked by the cross as it appears in the record there. I will ask you is that is not the testimony that you gave at the coroner's inquest?

(The testimony in question is as follows:

"Q. What, if anything, did you see?

"A. Keerl was up there and was wiping his nose a little bit, then he says: 'Tell that son of a bitch that he is a horse's a- and I will fix him, I will fix the son of a bitch, I will meet him with a gun.")

WITNESS:

A. That is similar to it except for the language that he used.

Q. Well, is it or is it not the testimony that you gave at the coroner's inquest?

A. I could not say that because I am unable to remember.

Dr. CHARLES H. HEAD testified on behalf of the state in rebuttal, as follows:

My name is Charles H. Head. I live at Helena and have lived there eighteen years. I am a dentist. I am acquainted with the defendant James S. Keerl and have know him in the neighborhood of twelve or fourteen years. My acquaintance with him has been professional and social. I was his dentist for five or eight years. I could not state just exactly how often I met him during the period of time specified, probably met him once a month or twice a month during that period of time. I had conversations with him most every time I would meet him or he would be in the office, I
96 can't just tell how often.

Q. With reference to these meetings and business relations and conversations had with the defendant prior to the 11th day of April, 1902, I will ask you to state, doctor, whether you observed anything in his manner or conversation or demeanor or association with him in a business way or otherwise that indicated to you that he was anything other than wholly rational and sane?

Mr. WALSH, of counsel for defendant: We object, the witness has not qualified to testify as a non-expert.

COURT: Let the objection be overruled to this question.

Mr. WALSH: Note an exception to the ruling of the court.

Mr. WALSH: We object specifically to this question upon the grounds that the witness has not shown himself competent to testify upon the subject and has not qualified himself as having an intimate acquaintance with the defendant, nor is it shown that any intimate acquaintanceship exists, or ever did exist between the witness and the defendant and because the question does not ask the witness for any impression or opinion formed or gained at the time on any particular occurrence or series of occurrences.

COURT: The question I think fairly calls for the impression or impressions that may have been made at the times referred to; it ought to be limited to that, not what his opinion now is.

Mr. WALSH: I don't think the witness on the stand understands the question that way.

97 COURT: I think so. I think I will overrule it.

A. No, sir, I didn't observe anything at all.

WILLIAM LAREAU, a witness for the State, testified in rebuttal as follows:

I have lived in the city of Helena since the spring of '68. I have testified already that I know the defendant. I couldn't tell you when I first became acquainted with the defendant, it is long ago. I should judge I know him about twelve or fifteen years. I was on the police force most of the time, sometimes on day and sometimes on night duty. Frequently in connection with my duty as an officer. It is pretty hard to tell how often I saw the defendant, sometimes I would see him a dozen times a day and then probably not see him for a week; I could not tell anything about that; I see him very often. I had many conversations with him during that period. I never had much conversation with him only when he was drinking

Q. Did you have conversations with him when he was drinking that you recall now?

A. Well, lots of times, yes.

Q. Extended conversations of some duration?

A. Well, no, just met him you know, and he wanted to talk to all the officers when he was on a spree and wanted to take drink and cigars and so on.

Q. I will ask you, officer, from your acquaintance with the defendant as you have testified, from the various times you saw him and from the conversations you had with him during that period
98 and prior to the 11th day of April, 1902, to state whether you ever observed anything about the defendant that indicated that he was other than a wholly rational and sane man?

MR. WALSH: We object to that on the ground that the witness has not shown himself competent to testify, particularly he has not shown himself to be an intimate acquaintance of the defendant and has particularly stated that he rarely if ever conversed with him except when he was intoxicated. It appears conclusively from his testimony that he is not qualified to testify by reason of the fact that he is not an intimate acquaintance, and we object further upon the ground that the witness has not shown himself an expert in any way and he is not questioned concerning any impression or opinion he formed by reason of any particular fact or whether such an opinion or impression was formed at any time prior to the shooting which is the subject of this inquiry.

Which objection was by the court overruled, to which ruling of the court the defendant then and there excepted.

WITNESS: Well, I always thought he was a sane man.

THOMAS TRAVIS testified as a witness in behalf of the State in rebuttal, as follows:

I have known the defendant for about fifteen or eighteen years and have seen him frequently during that period. During the last four years or three years I saw him frequently, probably twice a week, twice a day sometimes. During this period I had conversations with him. I used to meet him very often on the street and

frequently converse with him. I had a conversation with
99 him prior to the shooting. It was in the Helena theatre four or five days before the shooting. I took Mr. Keerl out of the seat and took him over to his room and *and* told him he must stay there and he promised me that he would, that he would not go back and disturb the performance any more, providing I wouldn'- take him to the city jail. He was intoxicated at the time. I didn't see the defendant after that time until the shooting. I have had many conversations with the defendant at the time that he would be on the street in an intoxicated condition; walked down street with him and took him to his room part of the time; sometimes he would go home but he would always have his military address—Major or Colonel—walked very straight and down to his room, many times while I was chief of police. I don'- remember any of the topics when I conversed with the defendant But I have conversed with this defendant and he would tell me where he had been, that he hadn'- drunk very much and that he wasn't drunk. He would always declare that he wasn't drunk when he was acting strangely on the street. He used to address me as colonel; sometimes I was sergeant and sometimes corporal—anywhere along the line. He never spoke to me about the Boer war or the Græco-Turkish war.

Q. How frequent would these meetings with the defendant be during the last four years, would you say?

A. Well, I think I have met the defendant at least twice a month within the last three years, that is prior to the shooting.

Q. Now I will ask you, Mr. Travis, if from these conversations of him you ever observed anything prior to the 11th day of April,
1902, in his conversation or his talk or his manner or de-
100 meanor that indicated to you that he was anything but wholly rational and sane?

Mr. WALSH: We object, for that the witness has not shown that he is an acquaintance of the defendant nor shown that he came into contact with him in any manner whatever except as a police officer in the discharge of his duty when the defendant was intoxicated. He does not pretend by his testimony ever to have conversed with the defendant when he was sober even so as to enable him to form any judgment about the matter at all and particularly if he was shown to be an acquaintance at all he is not shown to be an intimate acquaintance of the defendant.

Which objection was by the court overruled, to which ruling of the court the defendant then and there excepted.

WITNESS:

A. No sir, I never did.

CHARLES S. HALL, a witness for the State, testified in rebuttal as follows:

My name is Charles S. Hall. I have lived in Helena thirty-nine years. I have been in the car service of the Helena Light and Traction Company for six years. I have known the defendant for about

fifteen years. At one time I was fireman in the Atlas Block and he had an office in the Atlas Block. I was in the employ of A. J. Galen for six years and during that time I used to meet the defendant quite often. I had conversations with him *him* during that time, doing my business there I used to run across him three or four times a week, may be more. Sometimes he was under the influence of liquor and sometimes he was not. I saw the defendant on or about the 11th day of April, 1902. On the 11th of April
101 at nine o'clock he came over into A. J. Galen's office and asked me if Mr. Galen was in; I told him "no," that he was a little too early. I asked him if his business was important and he said "no." I said, "If it is I can telephone for him to come down," and he said, "No, any time during the day will do." He was sober. He said "Good morning" and went out.

I never had a great deal of conversations with him in his office. Once in a while he used to show me his drawings and draughts that he had there; converse with me concerning them and what they were, but I didn't have very much time to bother with him. He spoke to me several times concerning the Madison river project, told me about it, and what a good thing it would be to have that in there. the water. Before I went into the Atlas Block I have met him, but I never had no conversation with him until I was employed in the Atlas Block. That would be from six years up to the present time.

Q. I will ask you, Mr. Hall, whether from these various conversations had with the defendant and from your observation of him in his office and otherwise you have observed anything in his conversation or conduct or manner or demeanor that indicated to you anything but that he was wholly rational and sane?

Mr. WALSH: We object to this on the ground that the witness has not shown himself competent to testify, has not shown that he is an intimate acquaintance of the defendant or that any intimate acquaintanceship exists between the witness and defendant and
102 he is not asking to tell about any impression that was made upon his mind at any particular time by reason of any particular circumstances. If permitted to testify concerning the sanity of the defendant any person who met him casually would be equally competent to testify.

Which objection was by the court overruled, to which ruling the defendant then and there excepted.

WITNESS:

A. I did not.

Cross-examination by Mr. NOLAN:

I was employed as janitor about six years, which would be about three years before the 11th of April, 1902. Before that time I was mining at Nevada Creek, about seventy-five miles from Helena, during the summer months for about three months, and during the remaining nine months I was working for Raleigh and Clark in Helena delivering goods. Before I became janitor at the Atlas Block I had no personal association with the defendant; do not recol-

lect ever speaking to him. When I say I knew him for a number of years I meant that I knew him and saw him but had no conversation with him. After I became janitor of the Atlas Block I had business associations with him. I never collected rent from him; my only association would be that I would encounter him as I would go to his office or came away from it. In meeting him under these circumstances in going to his office or going from there I would simply say "Good morning" or "Good evening" and that would be the extent of the conversation I had with him under those circumstances. The only other association I had with him would arise from going to his office and engaging in conversation with him as I have
103 testified, and during those three years I went to his office not over half a dozen times; the conversations in the office would not be more than ten or fifteen minutes and I could not say how many of those times he had been drinking. When he called my attention to those engineering projects and drawings he had been drinking. I didn't go to his office when my attention was directed to the drawings and plans at his invitation, I went of my own accord to see that everything was all right with the heat; this was in the winter time, of the year that -he shooting occurred. He called my attention to plans and drawings and specifications not more than three or four times. I am not a civil engineer. The other times there was no conversation, he only asked me to look at the drawings he had. One time he was telling me about this ditch from the Madison he mentioned the fact that this was a drawing of a ditch to take water from the Madison river; he did not explain it to me because I didn't know anything about it. I don't think he was drunk when he called my attention to the drawing of the ditch from the Madison river. I cannot tell the circumstances attendant upon his calling my attention to his drawings, my not being an engineer; not more than a few minutes would be consumed in calling my attention to them. I saw him once when I thought he was drunk; it was quite a while before the shooting. The time I saw him he was on the street. I took him upstairs, he went into his room and I had nothing more to do with him.

Mr. NOLAN: We will move to strike out the evidence of this witness in reference to the mental condition of the defendant, for the reason that he has shown on cross-examination that he is not
104 competent to testify to that fact.

Which motion was by the court denied; to which ruling of the court the defendant excepted.

JACOB A. YUND in behalf of the State testified in rebuttal as follows:

I have known the defendant six or seven years, which would be three or four years prior to the shooting in April, 1902. I had business relations with him more or less, he used to come into my place to purchase things and make loans of certain articles; I would say that he was to my place a couple of dozen times anyway. I recall the incident of selling him an overcoat at one time, it was the

overcoat he had on at the time of the shooting; at that time I had a conversation with him most assuredly. I recollect when he came in there and borrowed some money upon a transit, and at this time I most assuredly had a conversation with him; the nature of the conversation was such as would take place when one wants to borrow a loan. When he first got a loan on the transit it was only a small sum and then he came back at divers times to get additional loans; I should say he got three or four additional loans until he got the limit. I recall the incident of loaning him money upon his watch and then I most assuredly had a conversation with him. I sold him a watch, it could not have been very long previous to the tragedy I sold the watch and most assuredly had a conversation with him; I also had a conversation with him in regard to a field glass instrument; he talked about telescopic instruments. I loaned him the field glass a little over a month previous to the shooting, and
105 he came in the morning of the shooting and I had a conversation with him then. I met the defendant upon the street at other times and spoke to him.

Q. I will ask you, Mr. Yund, to say whether or not from these conversations and business associations and dealings had with the defendant you ever observed anything in his manner or his conversation or demeanor or his association with you that indicated to you that he was anything other than a wholly rational and sane person?

Mr. WALSH: We object to this witness answering the question; he has not shown himself competent to testify, hasn't shown himself to be an intimate acquaintance of the defendant; the question does not call for a fact, but a conclusion from the fact, and further that the witness has not said at any time that the facts concerning which he draws his conclusion impressed him at the time as to the sanity or insanity of the defendant, particularly as he testified that it was at any time prior to the shooting.

Which objection was by the court overruled; to which ruling of the court the defendant then and there excepted.

WITNESS: I never seen anything about his actions or heard anything about his conversations but what I thought perfectly rational; in fact I always took him to be a very intelligent person.

FRANK J. KENCK testified in behalf of the State in rebuttal as follows:

I am acquainted with the defendant. I know him about sixteen years previous to the shooting and during that period I have seen him quite often; most of the time in my place of business.
106 We had business transactions; I remember one time I loaned him money; I also hired out the band for the meetings of the civil engineers, made arrangements with him. I also recall another time when he was in my saloon in the evening, he was in there nearly all the evening and I engaged in conversation with him at that time; we were talking politics. He used to come into my place right along to drink and I waited on him on those oc-

casions. I would say that I met him and talked with him very frequently during the sixteen years but I could not tell how often; I also visited him in his office two or three times and conversed with him there on various subjects. He conversed with me concerning the Madison river project.

Q. I will ask you, Mr. Kenck, if from these various conversations and associations with the defendant up to the 11th day of April, 1902, you ever observed anything in his manner, or his conversation, or his demeanor, that indicated to you that he was anything but a wholly rational and sane man?

Mr. WALSH: We object; the witness has not shown himself competent to testify, has not shown that he was an intimate acquaintance with the defendant and the witness is not asked to give any impression made upon his mind at any particular time or by reason of any particular circumstance occurring prior to the time of the shooting that is the subject of inquiry, and for the reason that the witness is not asked to give any facts, but substantially to give his opinion.

Which objection was by the court overruled; to which ruling the defendant then and there duly excepted.

A. Nothing whatever.

Mr. WALSH: I move to strike out the answer as not re-
107 sponsive; the answer should be yes, he did, or did not.

COURT: He says, "Nothing whatever."

Mr. WALSH: I except to the ruling of the court.

JOHN B. MCLEOD testified in behalf of the state in rebuttal as follows:

My name is John B. McLeod. I have lived in Helena since 1890. I am a draughtsman and have been in the business five years. I work in the Surveyor General's office. I know the defendant since 1890. My business prior to five years ago was surveyor. Since 1890 I have met the defendant two or three times a week and sometimes I might not meet him for two months. I have had conversations with the defendant, mostly on engineering subjects. I have been to his office more than once. He has discussed the Madison river projects with me. I have discussed irrigation works with him in which I was employed in the Gallatin Valley. It was during the period from 1891 to 1895. I cannot state how many times I had discussions with him. I have seen him under the influence of liquor a good many times and saw him in some of the saloons around town; I talked to him on those occasions; in those instances I tried to make my conversation brief.

I know a society known as the Montana Society of Engineers; the defendant was a member of that society. I have attended meetings of that society by invitation; I am not a member of the society. I do not recall now whether the defendant delivered an address at the meeting at which I was present or whether the address was
108 read at the meeting; the address was signed James S. Keerl, President of the Society. I remember a meeting held in

Helena to discuss the Madison river project. I was present at the meeting and the defendant was present. The defendant took part in the discussion. I have seen notices and plats signed by the defendant in the Surveyor General's office and I had occasion to check them. I saw him at the Surveyor General's office more than once, it might be more than ten times.

Q. I will ask you, Mr. McLeod, whether from these relations with the defendant and these conversations had with him during that time you have testified, you ever observed anything in his talk, or demeanor, or conversations or actions that would indicate to you that he was anything other than wholly rational and sane?

Mr. WALSH: I make the same objection as made to witnesses that have testified similarly heretofore.

Which objection was by the court overruled; to which ruling of the court the defendant then and there duly excepted.

JEFF O'CONNELL testified in behalf of the state in rebuttal as follows:

My name is Jeff O'Connell. I reside at Helena and have resided there fifteen years. I was sheriff of that county from 1901 to 1905. I know the defendant twelve or thirteen years. Before I was sheriff I was policeman for eight years in Helena; during the time I was policeman I saw the defendant maybe every day or week. I often talked with him; I don't know just exactly what I talked about. I have seen him sober and under the influence of liquor. I
109 have taken him to the station when they said he was a nuisance on the street and have taken him home; I have seen him quite a few times drunk. I don't know that I ever talked with him about the Madison river project. The instance when I took him home five or six years ago, I took him to the station; Con. Becker was chief of police and he told me to take him home; I took him home in a hack and his wife asked me to take him away that she didn't want him, to take him to the office. I took him to the office in the Atlas Block; this was in the day time. I saw him at times when he wa- sober and I would pass the time of day with him on the street.

Q. I will ask you, Mr. Connell, to tell us whether from these conversations that you had with him and your observation of him you ever observed anything in his actions or conduct or conversation that indicated to you that he was anything but a wholly sane and rational person?

Mr. WALSH: To this witness testifying in answer to this question we specially object because it appears from the testimony of the witness that he is not competent to testify upon the subject in any manner, does not pretend to ever have had any talk with him when he was sober except merely to pass the time of day.

COURT: He says he has had talks with him very frequently but does not detail the conversations. I think you should show by this witness that to some extent at least the nature of the conversation he

has had, if he has had any conversations at all, and not just the bare statement he has had frequent conversations and stop at that.

WITNESS (continuing): I do not recall any of these conversations, I don't recall the conversation I had with him in the hack
110 the day I took him home. As to the number of times during the fifteen years I have seen him every week or so, maybe every day sometimes.

Q. Were you well, or otherwise, acquainted with him?

A. Oh yes, well acquainted with him.

Mr. WALSH: I move to strike out the answer just given and object to the question because it calls for a conclusion of the witness.

COURT: Overrule the motion.

Mr. WALSH: Note an exception.

Q. From these conversations that you have testified to as frequently occurring and from your relations with this defendant and from your observations of him I will ask you whether you have observed anything in his conduct, manner, demeanor or conversation that indicated to you that he was anything but a wholly rational or sane man?

Mr. WALSH: We renew the objection.

COURT: Overrule the objection.

Mr. WALSH: Note an exception.

A. Why, I think not.

EDWARD S. WALKER, a witness in behalf of the state in rebuttal, testified as follows:

My name is Edward S. Walker. I have lived in Helena this last time twenty years and I held the position of police judge for eight years previous to 1902. I know the defendant twelve or fifteen years and previous to the 11th of April 1902, I would see him very often, sometimes every day for a week and then possibly I
111 would not see him for a month or so. I met him very frequently during those times; I simply talked with him common-place; I remember him talking to me on the water question is the only thing I remember; this was in reference to the Madison river project. I have met him on several occasions at the city hall, met him on the street different places, also in saloons. Generally when I met him in a saloon he would be under the influence of liquor. He was always talkative when he was in that condition. I saw the defendant on the 11th of April, 1902. I met him first in the morning when I was on my way to the office some time between nine and ten o'clock; I did not speak to him then. I next saw him immediately after the shooting at the jail, I think it was along about two o'clock or a little after possibly; I don't remember the hour exactly. I had a conversation with him then. I was told of the occurrence and come down stairs and Mr. Keerl was there in the "Bridal Chamber." There were parties there talking to him—I think Mr. Gans, the newspaper reporter, had been talk-

ing to him and left him. This was in the city hall. I stepped up and spoke to Mr. Keerl and asked him what the trouble was. He told me that "that man struck me," he says, "and that is something I don't allow any man to do." I told him "Mr. Keerl, you have been talking too much here; the best thing you can do is to wait awhile until you can see your attorney," I says, "Keep quiet, don't talk to anybody." He thanked me very kindly and went and sat down. At the time of this conversation he was right inside the door; there is a grating at the door; the door was just between us.

112 Q. I will ask you, Judge, whether from your observation of the defendant, from the conversations you have had with him and the relations sustained to him you ever noticed anything in his demeanor or conversation or manner or actions that indicated that he was anything other than a wholly rational and sane person?

Mr. WALSH: We object to that as the witness is not shown competent to testify, and object for the same reason heretofore urged to questions put to other witnesses of the same character.

COURT: Overrule the objection.

Mr. WALSH: Note an exception.

JOSEPH C. MURRAY testified for the state in rebuttal as follows:

My name is Joseph C. Murray. I have lived in Helena seventeen years. I am in the livery business and am alderman in the city of Helena from the second ward, have been such alderman for three years. I run a livery business in Helena. I know the defendant; have known the defendant in the neighborhood of nine or ten years, perhaps eleven; during this period I could not say exactly how often I saw the defendant; I have met him off and on quite a few times. I have talked with Mr. Keerl numbers of times off and on. He has come to my place of business many times; how many I am not able to say. Mr. Keerl and I have been friends for quite a few years and Mr. Keerl drops in to see me once in a while as a friend. I can't recall any conversation I ever had

113 with him at my place of business. He was at my place of business one time and he had a roll of papers in his hand, and he started to say something about the water business and wanted to write up a piece for me, that is a lecture, and he kind of went up there and I throwed it off into something else. I can't say that he was always sober when I have seen him; I have seen him in other conditions quite a number of times. I saw Mr. Keerl on the 11th day of April, 1902. Mr. Keerl hired a livery rig from me on that day; after he engaged the rig I saw him down at August Fack's saloon. I had no conversation with him there only that Mr. Keerl came out and got into the rig and took the lines from me and asked me to go into the saloon and tell the gentleman to come out, that we were waiting for him, and he says to me, "You can have a drink while you are in there, I have had mine." The two gentlemen that were in there came out after a little bit. I drove to For- Har-

rison with Mr. Keerl; we left town about half past ten; we stopped at Mr. Kessler's on our way and this would be about half way between Helena and the Fort, he asked me to stop for a drink; the defendant drank his; he had two glasses of beer there. From there we drove to Fort Harrison and stopped at what we supposed were officers' headquarters and he called for some gentlemen there and the parties told him they were out in the back-grounds shooting at a mark. Mr. Keerl told me to drive out there. I did so. We drove up and Mr. Keerl jumped out of the rig and proceeded to the grounds where they were shooting and proceeded to talk to some of the officers. They seemed to pay no attention to him; he turned around and walked over to some of the privates and from that he reversed and came back to the rig and told me to drive on
114 in. On the way in he was driving by the barracks and he asked me to stop there. Mr. Keerl got out, got up on the platform and got into the rig and we proceeded to Helena. On our way in we stopped at Kessler's again and took in three gentlemen; two of the men were dressed in soldier's clothes and one in citizen's clothes. Coming in the defendant was talking to the men in the rig and singing. I drove up Main street when I got to town and proceeded to the Milwaukee saloon, but I can't say that all of the gentlemen rode up there with me at all; some of them got out on Main street. After going to the Milwaukee saloon the defendant got out of the rig; I asked him if he was through and he told me I could go home. I pulled out my watch and seen it was just one o'clock and drove home. When I met him in front of Fack's, or shortly after that time, he told me he was out all night drinking.

Q. I will ask you to say, Mr. Murray, whether from conversations with Mr. Keerl that you have testified to, his calling on you at your stable and his conversations with you upon the day of the shooting and your observations of his actions and demeanor, you have observed anything in his conduct or his conversations that would indicate to you that he was anything but a wholly rational and sane man?

Mr. WALSH: Object to the question for the same reason given to similar questions.

COURT: Overrule the objection.

Mr. WALSH: Note an exception.

WITNESS:

A. No sir.

115 HERMAN F. LIDOLPH, a witness for the state on rebuttal, testified as follows:

My name is Herman F. Lidolph. I have lived in Helena since last January; before that I lived in Canyon Creek; this place is about twenty-five miles from East Helena. I lived at Canyon Creek three years and before that I lived at East Helena for twenty-two years; I lived about a quarter of a mile from the town of East Helena. I know the defendant Keerl probably fourteen or fifteen years. I had

a conversation with him before the shooting, probably about two weeks; this conversation took place at Kelley's Club saloon in Helena; it was probably about half past one in the afternoon. I spoke to Mr. Keerl and he says, "I ought to know you." I says, "I guess you do, my name is Lidolph." "Oh, yes," he says, "Lidolph from East Helena." I says, "Yes sir," and we just had a conversation there about where I used to line at East Helena close to his father-in-law's ranch, and then we got into a conversation that there was a lake within four miles of my place, and I was telling Mr. Keerl of it, knowing he was an engineer, and told him I wanted to go up to that lake some day and see if I couldn't get water out of it, couldn't be tapped, and he said "I would like to see that lake myself." I told him that I would go up and see it and take in the situation and report to him. He said that he had often talked about bringing the Madison river in, in a canal, and I told him that I thought it would be a good idea to get that in here for the Prickly Pear valley. I was talking to him altogether probably fifteen or twenty minutes.

Q. I will ask you to say, Mr. Lidolph, whether from this conversation or from his manner or demeanor at that time you ob-
116 served anything that indicated that the defendant was anything but a wholly rational and sane person?

Mr. WALSH: We object to that, the witness has not shown himself competent to testify and not shown himself to be an intimate acquaintance.

COURT: Overrule the objection.

Mr. WALSH: Note an exception.

A. I did not.

JOHN G. BULLARD, a witness for the state in rebuttal, testified as follows:

I live in Helena, have lived there over thirty-one years. I am a draughtsman in the Surveyor General's office; have held that position twelve or fifteen years. I know the defendant James S. Keerl. I have seen him ever since he has been in Helena; I gues- that would be probably eighteen years. I worked for him in 1899, probably two or three weeks, evenings, at his office in the Atlas Block, platting from notes that he had taken on some buildings. Mr. Keerl was in the office off and on; sometimes I would have to go out and get him to show me about things I did not understand. I did this four or five times probably; I found him on the street on some of these occasions and several times in saloons; once I found him in the Grand Central bar room and another time in a saloon in the Atlas Block. In 1899, about this time, he was drinking a little, and when I found him in the saloons he was talking principally and also drinking, one time at the Grand Central bar room. He wanted me to have a drink and I did not care to drink anything while I was working; I took lemonade and he *he* took a little
117 glass of brandy. He seemed to be all right at those times; it was noticeable that he had been drinking a little bit, principally through his talk; he was always able to explain the notes

though. After 1899 I met him several times. Another time the negro Banks and Keerl and myself were in the office and Banks went down and brought up two bottles of beer which we drank. When a map of Madison county was in preparation Keerl came to the office and made a tracing of a certain portion of it; that was in 1900. I would be with the defendant in the office for quite a length of time and I may have seen him in the street several times in 1900; I recall being with him a portion of a night; I wanted to keep him sober and I staid with him for quite a little while and finally got him to his house. I left the office about nine or ten o'clock and remained with him until about half past one or two; during this time we went to Fack's saloon and had several drinks, and about 1:30 I walked up the hill with him and took him home. After we got to the house he played the piano. I think I helped him play a duet. Liquor would seem to increase his ability to play the piano. After we got to the house Mr. Keerl went out and got a bottle of beer; I remained at the house probably an hour. I have seen him indulge in these military tactics, movements; he would go through these when under the influence of liquor; when not under the influence of liquor he was all right. He did not seem to be noisy when he was sober. Once or twice when I took him out of the saloons to go to his office he was indulging in those military tactics, drilling imaginary people.

118 Q. I will ask you whether from these conversations with Mr. Keerl that you have testified to, and your association with him and your observation of his actions and demeanor, you have observed anything in his conduct or his conversations that would indicate to you that he was anything but a wholly rational and sane man?

Mr. WALSH: Object to the question for the same reasons given to similar questions put to the other witnesses.

COURT: Overrule the objection.

Mr. WALSH: Note an exception.

WITNESS: No sir.

Mr. WALSH: The statute which permits the testimony of non-expert witnesses to be given also requires that in connection with that the reason for the opinion must be given. No reason for any of the opinions expressed by these witnesses has been given and we now move to strike out the testimony of the witnesses: Mr. Yund, Travis, Dr. Head, William La Reau, Charles S. Hall, Frank J. Kenck, John D. McLeod, Jeff O'Connell, Edward S. Walker, James C. Murray, Herman F. Lidolph and J. G. Bullard, for the reason that no reasons have been given by the witnesses for the opinions expressed.

COURT: Let the motion be denied.

Mr. WALSH: Note an exception to the ruling of the court.

Be it further remembered that in sur-rebuttal, GEORGE E. BAYHA, a witness for the defendant, was called and testified as
119 follows:

(Examined by Mr. WALSH:)

My name is George E. Bayha. I am chief deputy clerk of the district court of Lewis and Clark county, Montana, and I have been in that office since the fall of 1895.

Q. I show you this document, Exhibit Three, which seems to have your endorsement, and ask you what it is?

A. It is dated, endorsed: "No. 370. *In re* Coroner's Inquest on body of Thomas Crystal. Filed June 19, 1902. Finley McRae, Clerk, By George E. Bayha, Deputy Clerk." Was presented and filed as coming from the coroner as the testimony taken at the inquest on the body of Thomas Crystal. The endorsement is in my handwriting. I do not recollect the person who presented the paper. It is one of the records of my office and was filed there June the 19, 1902.

Mr. NOLAN: I now desire to offer in evidence a portion of the testimony given by the witness Soule, to which his attention was directed, as disclosed by the coroner's inquest marked Exhibit 3, the portion that I refer to appearing at page 41, and beginning with the question: "You may tell what, if anything, you did towards serving any drink to Mr. Keerl," and ending with the statement: "He told him he would pay for it."

This is the testimony heretofore presented in this Bill of Exceptions at page 36, and page 101 of this record, and is referred to there rather than repeating it here.

Mr. SPAULDING: To which we object on the ground that the offer is incompetent, irrelevant and immaterial; upon the further
120 ground no proper foundation or any foundation has been laid for the reception of the so-called record or testimony; and upon the further ground that it does not appear that it is the testimony of the witness Soule, or of any other witness given at the Coroner's inquest at any other judicial proceeding at any other time; and upon the further ground that there is no showing that this paper offered was ever in the possession of the coroner or ever delivered to the clerk of the district court as a purported copy of the testimony of witnesses given upon said inquest or any inquest or upon any inquiry, judicial or otherwise; and upon the further ground that the paper does not contain any certificate of the coroner, any signature of any witness or any authentication whatever.

COURT: I will sustain the objection.

To which ruling the defendant duly excepted.

Mr. NOLAN: I desire to offer in evidence from the same document, identified as Exhibit 3, the portion of the testimony of the witness Soule given at the Coroner's Inquest as disclosed by this record on page 42 of the same, beginning with the question: "Do you know of anything that passed between Mr. Keerl and Mr. Crystal after the crowd came down stairs, and ending with the answer: "He went out of the front door; they all went out at the same time."

(This is the testimony heretofore offered at page 38 of this Bill of Exceptions, and page 103 of this record, and reference is made to it there to prevent a repetition of it here.)

Mr. NOLAN: I also desire to offer in evidence from the same record the testimony of the witness Soule, or the alleged testimony
121 of the witness Soule, appearing on page 43 of this record marked "Exhibit 3," beginning with the question "What, if anything, did you see or hear that occurred between Mr. Crystal when they went up there together?" and ending with the portion of the evidence immediately preceding the question: "What, if anything, did you do?"

(The same being the testimony heretofore appearing in this Bill of Exceptions at page 39, and page 104 of this record, and reference is made to the testimony appearing there to prevent a repetition here.)

Mr. NOLAN: We also offer from the same record the testimony appearing at page 43, beginning with the question: "What if anything did you see?" and ending with the sentence, "Then I came down."

(The same being the testimony appearing heretofore at page 40 of this Bill of Exceptions, and page 105 of this record, to which reference is hereby made so as to prevent the repetition of the testimony here.)

To each and all of which offers objection was made by Mr. Spaulding, representing the state, for the reasons stated in the objection interposed to the first offer; which objections were severally sustained by the court, to which ruling of the court in sustaining such objections the defendant excepted, and the evidence contained in the offers of proof as tending to impeach the witness Soule as contained in said record was excluded from the consideration of the jury.

Be it remembered likewise, to sustain the special pleas of
122 once in jeopardy, former acquittal of murder in the first degree, and former acquittal by reason of the alleged premature discharge of the jury upon the second trial of said defendant in Lewis and Clark county, Montana, said jury having been discharged on the 14th day of July, 1904, the defendant offered in evidence to sustain said special pleas of former acquittal of murder in the first degree, of once in jeopardy and of former acquittal by reason of the alleged premature discharge of the jury upon the second trial of defendant in 1904, the original information, plea thereto, copy of the minutes of the first trial of defendant, had in Lewis and Clark county, in 1903, copy of the verdict of the jury on said first trial and of the judgment rendered and entered upon said verdict, copy of said defendant's plea to said information upon his second trial in 1904, copy of the minutes of said second trial, copy of the instructions of the court given and refused and endorsements thereon, and copy of the minutes of said court when the jury upon said second trial was discharged without agreeing upon a verdict, as follows:

(Title of Court.)

(Title of Cause.)

Information.

In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, on this the 24th day of April, A. D. 1902, in the name and on behalf and by the authority of the State of Montana, James S. Keerl is accused by the county attorney of Lewis and Clarke county, Montana,
123 by this information of the crime of murder in the first degree, committed as follows:

That, at the county of Lewis and Clarke, in the State of Montana, on or about the 11th day of April, A. D. 1902, and before the filing of this information, the said James S. Keerl did, wilfully, unlawfully, feloniously, and of his deliberately premeditated malice aforethought, make an assault upon one Thomas Crystal, a human being, and a certain pistol, commonly called a revolver, which was then and there loaded with gun powder and leaden bullets, and by him, the said James S. Keerl, had and held in his right hand, he, the said James S. Keerl, did then and there wilfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought shoot off and discharge at, upon and into the body of said Thomas Crystal, thereby and by thus striking the said Thomas Crystal with the said leaden bullets; inflicted upon the said Thomas Crystal certain mortal wounds in the back, side and head of the said Thomas Crystal (a more particular description of which said mortal wounds is to the county attorney unknown) of which said mortal wounds the said Thomas Crystal did then and there languish, and languishing did live, and thereafter, on the 21st day of April, A. D. 1902, at the county of Lewis and Clarke in the State of Montana, did die; and so the said James S. Keerl did, in manner and form aforesaid wilfully, unlawfully, feloniously, and of his deliberately premeditated malice aforethought, kill and murder the said Thomas Crystal; all of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State of Montana.

O. W. McCONNELL,
County Attorney of Lewis and Clarke County,
State of Montana.

124 STATE OF MONTANA,
County of Lewis and Clarke, ss:

O. W. McConnell, being first duly sworn according to law, deposes and says: That he is the duly elected qualified and acting county attorney of Lewis and Clarke county, State of Montana, that he has read the foregoing information, made by him as complainant, and knows the contents thereof, and that the facts, matters and things therein stated are true to the best of his knowledge, information and belief.

O. W. McCONNELL.

Subscribed and sworn to before me this 24th day of April, A. D. 1902.

[NOTARIAL SEAL.] J. L. CALLAHAN,
Notary Public in and for Lewis and Clarke County, State of Montana.

No Bail.
HENRY C. SMITH, *Judge.*

Endorsed on the back: No. 671 (Title of Court and Cause) Information for murder in the first degree. Witnesses: J. C. Murray, Franz Fredericks, H. D. Thatcher, John Heinzberger, George Soule, M. H. Bryan, G. H. Scott, B. Hepner, B. Asheim, Chas. N. Duffy, Frank Kenck, Gustav Nissem, Ed. Byers, Adam Valles, Wm. Lareau, Thomas Travis, N. Salvaile, B. C. Brooke. Presented in open court and filed by leave of court this the 24th day of April, A. D. 1902. Finlay McRay, Clerk. By Geo. O. Bayha, Deputy Clerk. O. W. McConnel, County Attorney of Lewis and Clarke County,
125 Montana. Recorded in Information Book C—Page 127.

Thereafter, to-wit, on April 28th, 1902, the defendant by his counsel Messrs. C. B. Nolan and T. J. Walsh, filed his motion to vacate and set aside the order granting leave to file information, to vacate and set aside the order of arrest, and to quash and set aside the information, which said motion appears on page 5 of this Bill of Exceptions, and to save repetition reference is made thereto.

(*Minutes of the Court.*)

(Title of Court.)

No. 671.

(Title of Cause.)

Done in open court this 28th day of April 1902.

The county attorney with the defendant and his counsel came in this day into open court whereupon counsel for defendant moved the court to discharge the defendant which motion was by the court denied and duly excepted to by the counsel for defendant thereupon the defendant entered a plea of not guilty to the charge set forth in the information and court set June 30th, 1902 at 10 A. M. as the date for trial and the defendant was then remanded to the custody of the sheriff of this county to await the further orders of the court.

HENRY C. SMITH, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 18th day of May 1903.

126 This cause came on this day regularly for trial present defendant in person and by his counsel the county attorney

and the associate counsel for the state. Whereupon the following named persons were called duly sworn and empaneled to constitute the jury for the trial of this cause. Isaac Y. Wood, Walter A. Rogers, H. N. Logie, F. M. Shaw, John P. Murphy, Leopold Marks, F. C. Grenm, S. J. Burgess, Jos. D. Gokey, Wm. Fowler, Jos. Bowers and Andrew Lind. Thereupon the associate counsel for the state made opening statement to the jury whereupon the following named persons *were* called duly sworn and testified on behalf of the state: George B. Soule, thereupon court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings continued until 10 A. M. May 20th, 1903.

HENRY C. SMITH, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 20th day of May, 1903.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel for the state and the jury whereupon George B. Soule, Charles H. Duffey, Bernard Asheim and Frank J. Kenck were called duly sworn and testified on behalf of the state, thereupon court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings continued until 10 A. M. May 21st, 1903.

HENRY C. SMITH, *Judge.*

127 Title of Court.

No. 671.

Title of Cause.

Done in open court this 21st day of May 1903.

The trial of this cause was this day resumed present defendant herein in person and by counsel the county attorney the associate counsel for the state and the jury Whereupon the following named persons were called duly sworn and testified on behalf of the State Frank J. Kenck (recalled) Gustave Nissem, William Lareau, Thomas Travis, Mrs. Mary Crystal, Geo. Soule (recalled) and Dr. C. B. Brooke thereupon the state rested whereupon Robert N. Allen, Arthur T. Green and Milton Cauby were called duly sworn and testified on behalf of the defendant thereupon court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings continued until 10 A. M. May 22nd 1903.

HENRY C. SMITH, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 22nd day of May 1903.
The trial of this cause was this day resumed present defendant in person the county attorney the associate counsel for the state and the jury whereupon Alex. Burns, W. B. Sheehan and Wm. Mayger were called duly sworn and testified on behalf of the defend-
128 ant thereupon the depositions of Mrs. Charlotte S. Evans, Chas. T. Evans, Elenore P. Keerl, Dr. John B. Chapin, Mrs. Augusta J. Mowinkle, Dr. Chas. G. Hill, Dr. J. Percy Wade, Wm. S. Bryan, Jr., Dr. George J. Preston, Mrs. Marie S. Crook, Mrs. Charlotte S. C. House, Mrs. Prsicilla Welsh & Mrs. Mary Nicodemus whereupon court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings continued until 10 A. M. May 23d, 1903.

HENRY C. SMITH, *Judge*.

Title of Court.

No. 671.

Title of Cause.

Done in open court this 23d day of May 1903.
The trial of this cause was this day resumed present defendant herein in person and by counsel the county attorney the associate counsel for the state and the jury whereupon Wm. Mayger was recalled and Geo. C. Van Sickle and Frank L. Sizer were called duly sworn and testified on behalf of the defendant thereupon court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings continued until 10 A. M. May 25th, 1903.

HENRY C. SMITH, *Judge*.

Title of Court.

No. 671.

Title of Cause.

Done in open court this 25th day of May 1903.
129 The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel for the state and the jury whereupon the following named persons were called duly sworn and testified on behalf of the defendant Leon A. La Croix, John Milch, F. W. Kuphal, O. C.

Dallis, E. W. Bach, E. L. Flaherty, Edward Ivins, John P. Parks, A. K. Barbour, Dan Mahoney, Chas. A. Whipple, George M. Beurquin, Joseph Gleason and W. M. Donaldson thereupon the court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings continued until 10 A. M. May 26th, 1903.

HENRY C. SMITH, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 26th day of May 1903.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney and associate counsel for the state and the jury Whereupon the following named persons were called duly sworn and testified on behalf of the defendant. Jno. S. M. Neill, Mrs. MacDonald, Chas. Jennison, Al. Smith, Geirge F. Ingram, John N. Abercrombie, Jordan Banks, Nicholas Hilger, Chas. Campbell, Norman Nebergall, and George S. Duncan, Whereupon court admonished the jury according to law and consent of respective counsel said jury were allowed to separate and further proceedings continued until 2 P. M. May 27th, 1903.

HENRY C. SMITH, *Judge.*

130 Title of Court.

No. 671.

Title of Cause.

Done in open court this 27th day of May 1903.

The trial of this cause was this day resumed, present defendant in person and by counsel, the county attorney and associate counsel for the state and the jury whereupon the following named persons were called duly sworn and testified on behalf of the defendant, Seth Maxwell, Mrs. Keerl, Mrs. Wilson, and Dr. W. L. Steele, Thereupon the depositions of Captain W. C. Rivers & Dr. Samuel D. Lyons were read, Whereupon court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings continued until 10 A. M. May 28th, 1903.

HENRY C. SMITH, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 28th day of May 1903.

The trial of this cause was this day resumed present defendant herein in person and by counsel the county attorney the associate counsel for the state and the jury Whereupon Dr. W. L. Steele, Dr. O. Y. Warren, Dr. J. L. Hogan, Dr. Francis C. Adams, Dr. W. C. Riddell, and Dr D. L. Carmichael were called duly sworn and testified on behalf of the defendant thereupon the deposition of Geo. F. Cope was read thereupon defendant rested Thereupon J. H. Smith and A. L. Bowman were called duly sworn and testified in
131 rebuttal on behalf of the state whereupon court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings were continued until 10 A. M. May 29th, 1903.

HENRY C. SMITH, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 29th day of May 1903.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel for the state and the jury Whereupon the following named persons were called duly sworn and testified in rebuttal on behalf of the state A. L. Bowman, W. O. Hutchison, John Rabe, Geo. F. Goodridge, S. McKusick, Chas. S. Hall, Thos. J. Cronin, D. A McDonald, John D. McLeod, A. S. Hovey, C. H. Head, Jacob A. Yund, Thos. Travis, Wm. La Rue, Frank J. Kenck, Charles Duffy, Leonard Bailey, Dr. B. C. Brooke thereupon court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings were continued until 10 A. M. June 1st, 1903.

HENRY C. SMITH, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 1st day of June 1903.

The trial of this cause was this day resumed present defend-
132 ant in person and by counsel the county attorney the associate counsel for the state and the jury whereupon Dr. O. M.

Lanstrum, Dr. Charles Sweeney and Dr. B. C. Brooke were called duly sworn and testified in rebuttal on behalf of the state thereupon court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings were continued until 9:30 A. M. June 2nd, 1903.

HENRY C. SMITH, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 2nd day of June 1903.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel for the state and the jury whereupon court read its instructions to the jury thereupon respective counsel made closing argument to the jury and said jury retired in charge of a sworn officer to deliberate upon their verdict.

HENRY C. SMITH, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 3d day of June 1903.

In this cause the jury returned this day into court with the following verdict the defendant and his counsel and the county attorney being present said verdict was received by the court duly
133 filed and read by the clerk to the jury and acknowledged by the jury to be their true verdict.

Title of Court.

Title of Cause.

We the jury find the defendant James S. Keerl guilty of murder in the second degree in manner and form as charged in the information and we leave his punishment to be fixed by the court.

WILLIAM FOWLER, *Foreman.*

Thereupon court excused the jury from further consideration of this cause and ordered that sentence should be passed upon the defendant at 10 A. M. June 5th, 1903 whereupon the defendant was remanded to the custody of the sheriff of this county.

HENRY C. SMITH, *Judge.*

(Title of Court.)

(Title of Cause.)

Motion to Arrest Judgment.

Comes now the above named defendant James S. Keerl and moves the court to arrest judgment herein, and objects to the entry of any judgment on the verdict herein, for that:

1. The information does not state facts sufficient to constitute a public offense, and that the facts stated in the information do not constitute a public offense.

2. That the information does not state facts sufficient to constitute the offense of murder in either degree, and the facts stated in the information do not show the commission of the offense of murder of either degree.

C. B. NOLAN &
T. J. WALSH,
Attorneys for Defendant.

134 Due personal service of the foregoing motion to arrest judgment this 5th day of June, 1903, hereby admitted.

——— ———,
Attorneys for State.

Endorsed: Filed June 5th, 1903. Finlay McRae, Clerk.

Title of Court.

No. 671.

Title of Cause.

Done in open court this 5th day of June 1903.

The county attorney with the defendant and his counsel came this day into court The defendant was duly informed by the court of the nature of the information filed against him for the crime of murder in the first degree committed on the 11th day of April A. D. 1902 of his arraignment and plea of not guilty as charged in said information of his trial and the verdict of the jury on the 3d day of June A. D. 1903 guilty of murder in the second degree. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him to which he replied that he had whereupon counsel for the defendant asked and was granted leave to file a motion to arrest judgment said motion was argued by respective counsel submitted to and by the court overruled to which ruling counsel for the defendant duly excepted whereupon no sufficient cause being shown or appearing to the court thereupon the court renders its judgment That whereas the said James S. Keerl having been duly convicted in this court of the crime of murder in the second degree It is therefore ordered adjudged and decreed that the said James S. Keerl be punished by imprisonment

in the state penitentiary of the State of Montana in the
135 county of Powell for the remainder of his natural life.

The defendant was then remanded to the custody of the sheriff of the county of Lewis and Clarke State of Montana to be delivered by him into the custody of the proper officers of said state penitentiary.

Thereupon counsel for defendant filed notice of appeal and the court signed certificate of probably cause.

HENRY C. SMITH, *Judge.*

Title of Court.

Title of Cause.

Verdict.

We, the jury, find the defendant, James S. Keerl, guilty of murder in the second degree in manner and form as charged in the information and we leave his punishment to be fixed by the court.

WILLIAM FOWLER, *Foreman.*

Filed June 3, 1903.

136 (Minutes of Court and Documents Relating to Defendant's Second Trial in 1904.)

Title of Court.

No. 671.

Title of Cause.

Done in open court this 23d day of June 1904.

This cause came on this day regularly for trial present defendant in person and by counsel the county attorney and R. R. Purcell Esq., as associate counsel for the state whereupon counsel for defendant interposed a plea of former acquittal of murder in the first degree and once in jeopardy for the crime of murder in the first degree thereupon counsel for the state filed demurrers to said plea whereupon court sustained defendant's pleas and overruled the demurrers to said pleas to which ruling counsel for the state duly excepted; thereupon the following named persons were called duly sworn and questioned as to their qualifications to act as trial jurors in this cause Wm. L. McGahn, T. H. Kleinschmidt, W. E. LaReaue, Fred Holroyd W. L. Steele, Walter A. Rodgers, John Hehl, Lucas Lust, Finlay Urquhart, Jos Bowers, Michael Corbett, Milton Cauby, C. J. Nelson, P. H. Campbell, Henry Blase, E. S. Walker, Jos. Milch, Luther Smith, Chas. Gabisch, John Langan, J. N. Houle, N. Des Rosier, Henry Rossman, J. A. Widmer, Thos. D. Sloan, J. J. Lacy, Martin Mulvahill, Henry Hay Jr. Eugene Meyer, Wm. Laurimore, J. A. Mackey, P. F. Hosch, J. H. Russell, Herman

Gerber, F. A. Lalonde, H. Blaisdell, James H. Gilmour, T. A. Lightbody, and J. J. Fant, and of the foregoing named persons called the following named persons were excused from serving as trial
137 jurors in this cause for good cause shown viz: Henry Hay Jr. Martin Mulvahill, J. J. Lacy, Thomas D. Sloan, J. A. Widmer, Henry Rossman, N. Des Rosier, J. N. Houle Jno. Langan, Chas. Gabisch, Luther Smith, Jos. Milch, E. S. Walker, Henry Blase, P. H. Campbell, C. J. Nelson, Milton Cauby, Michael Corbett, Jos. Bowers, Finlay Urquhart, Lucas Lust, Jno. Hehl, Walter A. Rodgers W. L. Steele, Fred. Holroyd, Wm. E. LaRue, T. H. Kleinschmidt and W. L. McGahn. Thereupon the court admonished the jurors according to law and by consent of respective counsel said jurors were allowed to separate and further proceedings continued until 10 A. M. June 24th, 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 24th day of June 1904.

The trial of this cause was this day resumed present defendant herein in person and by counsel the county attorney R. R. Purcell Esq., as associate counsel for the state and the jurors heretofore called in this cause whereupon the following named persons were called duly sworns and questioned as to their qualifications to act as trial jurors for the trial of this cause W. A. Strawn, H. J. Boker, John Mitchell, Frank T. Holloway, I. L. Israel, Saml. Meyer, M. S. Weiss, E. L-Londe, C. E. Moreau, M. V. Wilson, Thomas Perisik, A. Palmquist, J. A. Doughty, E. McDonald, and Fred. Sass, D. E. White and all of said persons were excused from serving as trial jurors for good cause shown except D. E. White, Whereupon
138 E. McDonald was peremptorily excused by the state and Fred Sass who was excused by the defendant as well as Herman Gerber who was likewise excused by the defendant. Thereupon court admonished the jury according to law and by consent of respective counsel said jury were allowed to separate and further proceedings continued until 10 A. M. June 25th, 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 25th day of June 1904.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney R. R. Purcell Esq., as associate counsel for the state and the jurors heretofore called in

this case. Thereupon counsel for the state asked leave to amend the information herein by interlineation same was argued by respective counsel submitted to and by court denied to which ruling counsel for the state duly excepted Whereupon the following named persons were called duly sworn and questioned as to their qualifications to act as trial jurors for the trial of this cause: J. H. Urquhart H. W. Menth Thos. F. Hartigan, Matin V. Prosser, Gust. Bergquist, Louis Stadler, John J. Gebaurer, Herman Dickman Jr. Frank Hepperdiezel, L. C. Nelson, D. A. G. Flowerce, R. McDonald, Chas. N. Kessler, N. B. Holter, W. D. McMullen, Hugh Daly, Geo. Huffer, Hy. Teneick, C. J. Bracket, David Pizer and R. H. Kleinschmidt and all of the foregoing persons were excused except W. D. McMullen, Hugh Daly, Geo. Huffer, Hy Teneyck and C. J.
139 Brackett thereafter the state excused J. H. Russell, and the defendant excused F. Lalonde, Wm. Laurimore, Eugene Meyer, H. Blaisdell, B. H. Kleinschmidt and D-vid Pizer peremptorily. Whereupon court admonished the jurors accordingly to law and said jurors were allowed to separate and further proceedings were continued until 10 A. M. June 27th 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 27th day of June 1904.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney and R. R. Purcell Esq., as associate counsel for the state Whereupon James Gilmour was by consent of respective parties excused from serving as a trial juror on account of sickness in his family. Thereupon the following named persons were called duly sworn and empaneled to constitute the jury for the trial of this cause: T. A. Lightbody, J. J. Fant, P. F. Hosch, J. A. Mackey, Frank Jezich, M. J. Elias, D. E. White, W. D. McMullan Hugh Daly, Henry Teneyck, C. J. Brackett and George Huffer.

Whereupon respective counsel made opening statement to the jury. Thereupon the following named persons were called duly sworn and testified on behalf of the state L. W. Wickes, Frank L. Sizer, J. M. Moriarity, Geo. B. Soule. Whereupon court admonished the jury according to law and said jury were allowed to separate and further proceedings continued until 9:30 A. M.
140 June 28th, 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 28th day of June 1904.

The trial of this cause was this day resumed present defendant herein in person and by counsel the county attorney the associate counsel for the state and the jury Whereupon the following named persons were called duly sworn and testified on behalf of the state: George B. Soule (recalled), Bernard Asheim, Charles H. Duffy, Frank J. Kenck, Gustav Nissem and Wm. La Rue thereupon court admonished the jury according to law and the said jury were allowed to separate and further proceedings continued until 9:30 A. M. June 29, 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 29th day of June 1904.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel for the state and the jury. Whereupon the following named persons were called duly sworn and testified on behalf of the state: Wm. La Rue (recalled), Thomas Travis, Ed. S. Walker, Dr. B. C. Brooke, and Mrs. Crystal and thereupon the state rested.

Whereupon the following named persons were called duly
141 sworn and testified on behalf of the defendant: W. B. Sheehan, Alex. F. Burns, John Abercrombie, Geirge F. Ingram, Robt. S. Allen, Arthur T. Green and Dr. Wm. Treacy thereupon counsel for defendant read the deposition of Charles T. Evans Whereupon court admonished the jury according to law and said jury were allowed to separate and further proceedings continued until 9:30 A. M. June 30th, 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 30th day of June 1904.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel for the state and the jury. Whereupon Thomas Flynn and Milton

Cauby were called duly sworn and testified on behalf of the defendant Thereupon counsel for defendant read the following depositions Eleanora E. Keerl, Mrs. Charlotte S. Evans, John B. Chapin Mrs. Augusta I. Mowinkle, Charlotte S. C. House, Mrs. Priscilla A. Welch, Wm. S. Bryan Jr., Dr. Chas. G. Hill, Dr. J. Percy Wade, Dr. Geo. J. Preston, and Dr. Sam'l B. Lyon Whereupon court admonished the jury according to law and said jury were allowed to separate and further proceedings continued until 9:30 A. M. July 1st, 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 1st day of July, 1904.

142 The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel f the state and the jury Whereupon counsel for defendant read the depositions of Mary H. Nicodemus and Wm. C. Rivers thereupon the following named persons were called duly sworn and testified on behalf of defendant William Mayger, Nicholas Hilger, O. C. Dallas, Frank L. Sizer and Leon La Croix. Whereupon I Hamburger was duly sworn and thereupon said Hamburger read the testimony given at the former trial by Jno. S. M. Neill, John Milch, Charles A. Whipple and John R. Parks whereupon F. W. Kuphal, A. K. Barbour and Jordan Banks were called duly sworn and testified on behalf of defendant. Thereupon court admonished the jury according to law and said jury were allowed to separate and further proceedings continued until 9:30 A. M. July 2nd, 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 2nd day of July, 1904.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel for the state and the jury whereupon the following named persons were called duly sworn and testified on behalf of the defendant: George M. Bourquin, Ed. L. Flaherty, Jos. K. Widmer, George Van Sickle,

143 Al Smith, Joseph Gleason, Ed. Ivens, Dan Mahoney, Demsey Moore, Norman Nbergall, Wallace Donaldson, Charles Campbell, and George F. Duncan. Thereupon court admonished the jury according to law and said jury were allowed to

separate and further proceedings continued until 10 A. M. July 5th, 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 5th day of July 1904.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel for the state and the jury Whereupon counsel for the defendant read the deposition of Geo. F. Cope thereupon the following named persons were called duly sworn and testified on behalf of the defendant: John B. Wilson, Mrs. James S. Keerl, Mrs. Mary Wilson, Mrs. Catherine MacDonald, Lloyd Gans, Seth Maxwell, Dr. Wm. Treacy and Edwin S. Kellogg. Whereupon court admonished the jury according to law and said jury were allowed to separate and further proceedings continued until 9:30 A. M. July 6th 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 6th day of July 1904.

The trial of this cause was this day resumed present defend-
144 ant in person and by counsel the county attorney the associate counsel for the state and the jury Whereupon the following named persons were called duly sworn and testified on behalf of the defendant Dr. Edwin S. Kellog (recalled) Dr. G. R. Hogan and Dr. W. L. Steele and thereupon the defendant rested Whereupon the following named persons were called duly sworn and testified in rebuttal on behalf of the state J. H. Smith, H. F. Lidolph, George Teets, Terrance O'Donnell, Geo. F. Goodrich, Sanford McCusick, and John D. McLoed.

Thereupon court admonished the jury according to law and said jury were allowed to separate and further proceedings continued until 9:30 A. M. July 7th, 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this *this* 7" day of July 1904.

The trial of this cause was this day resumed present defendant herein in person and by counsel the county attorney the associate

counsel for the state and the jury. Whereupon the following named persons were called duly sworn and testified in rebuttal on behalf of the state: John D. McLeod (recalled) D. A. McDonald, A. S. Hovey, Gilman Bullard, Jacob Yund and Dr. O. M. Lanstrum Thereupon court admonished the jury according to law and by consent of respective counsel jury were allowed to separate and further proceedings continued until 9:30 A. M. July 8th 1904.

J. M. CLEMENTS, *Judge.*

145 Title of Court

No. 671.

Title of Cause.

Done in open court this 8th day of July 1904.

The trial of this cause was this day resumed present defendant herein in person and by counsel the county attorney the associate counsel for the state and the jury Whereupon the following named persons were called duly sworn and testified in rebuttal on behalf of the state: Dr. E. F. Conyngham, Frank Kenck, Chas. S. Hall, Dr. O. M. Lanstrum (recalled) and Dr. B. C. Brooke.

Thereupon court admonished the jury according to law and said jury were allowed to separate and further proceedings were continued until 9:30 A. M. July 9th 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 9th day of July 1904.

The trial of this cause was this day resumed present defendant herein in person and by counsel the county attorney the associate counsel for the state and the jury Whereupon the following named persons were called duly sworn and testified in rebuttal on behalf of the state Leon Shaw, Joseph C. Murray, Charles H. Head, T. J. Cronin, Wm. La Rue, Ed. S. Walker, Charles N. Duffy, Leonard Bailey and Isaac Hamburger thereupon the state rested in re-

146 buttal Whereupon the following named persons were called duly sworn and testified in sur-rebuttal on behalf of the defendant Dr. Wm. Treacy, Dr. Levi E. Holmes, Dr. Edwin S. Kellogg and Carl Christenson and thereupon the defendant rested in sur-rebuttal. Whereupon the court admonished the jury according to law and said jury were allowed to separate and further proceedings continued until 10 A. M. July 11th 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 11th day of July 1904.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel for the state and the jury Whereupon counsel for defendant asked leave to re-open the case for the purpose of defendant submitting newly discovered evidence to the jury after argument said request was denied by the court to which ruling counsel for defendant duly excepted. Thereupon court read its instructions to the jury Whereupon respective counsel addressed the jury Thereupon court admonished the jury according to law and said jury were allowed to separate and further proceedings continued until 9:30 A. M. July 12th 1904.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 12th day of July 1904.

147 Title of Court.

No. 671.

Title of Cause.

Done in open court this 12th day of July 1904.

The trial of this cause was this day resumed present defendant in person and by counsel the county attorney the associate counsel for the state and the jury whereupon respective counsel concluded their arguments to the jury and said jury retired in charge of a sworn officer to deliberate upon their verdict.

J. M. CLEMENTS, *Judge.*

Title of Court.

No. 671.

Title of Cause.

Done in open court this 14th day of July 1904.

In this cause the jury returned this day into open court the defendant being present in person and by counsel Whereupon it satisfactorily appearing to the court that there is a reasonable probability

that the jury cannot agree court ordered the jury discharged from further consideration of this cause and that the defendant be remanded to the custody of the sheriff of this county and that the sureties upon defendant's bond be and they are hereby released and exonerated Court further ordered that having presided at the trial of this cause upon request that all further proceedings herein be had before the Hon. Henry C. Smith the judge presiding in this department.

J. M. CLEMENTS, *Judge.*

148 At said second trial in 1904 counsel for defendant requested the following instructions, which were filed by the Clerk of the Court July 11th, 1904.

(Title of Court.)

(Title of Cause.)

Instructions Requested by Defendant (and Refused or Modified, with Notations by the Court Thereon.

In view of the fact that the information does not aver that the deceased, Thomas Crystal, died of the wounds inflicted by the defendant, you are instructed that he can be convicted of no offense graver than assault in the second degree, and you may find him guilty of assault in the second degree, or of assault and battery or of assault. Section 401 of the Penal Code is as follows:

"Every person who, under circumstances not amounting to the offense specified in the last section:

1. With intent to injure unlawfully, administers to, or causes to be administered to, or taken by another, poison or any other destructive or noxious thing, or any drug or medicine, the use of which is dangerous to life or health; or

2. With intent thereby to enable or assist himself or any other person to commit any crime, administers to, or causes to be administered to, or taken, by another, chloroform, *either*, laudanum, or any other intoxicating, narcotic or anesthetic agent; or,

3. Wilfully or wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon; or,

4. Wilfully and wrongfully assaults another by the use of a weapon or other instrument or thing likely to produce griev-

149 ous bodily harm; or,

5. Assaults another with intent to commit a felony or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person,

Is guilty of an assault in the second degree, and is punishable by imprisonment in the state prison for not less than one nor more than five years, or by a fine not exceeding two thousand dollars, or both."

And Section 402 is as follows:

"Every person who commits an assault or an assault and battery not such as is specified in the foregoing sections of this Chapter, is guilty of assault in the third degree, and is punishable by imprisonment in the county jail not more than six months, or by a fine not more than five hundred dollars, or both."

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Refused. J. M. Clements, Judge.

(2) Under the law of this state certain persons, including lunatics and insane persons, are incapable of committing crimes. Accordingly, if you find that at the time of the doing of the acts charged in the information against the defendant, he was an insane person, it is your duty to acquit him. P. C. 30.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Given as modified. J. M. C., Judge.

150 (3) The law presumes in the first instance that every man is sane, but that is a presumption which may be overcome. It is not necessary that it be established by a preponderance of the evidence that the defendant was insane at the time of the shooting, but if upon all the evidence you entertain a reasonable doubt as to the sanity of the defendant at the time of the commission of the act charged against him, it is your duty under the law to give him the benefit of the doubt and acquit him.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Given as modified. J. M. C., Judge.

(4) Drunkenness is a temporary state of the mind due to imbibing alcoholic liquors in which the normal action of the mental faculties is disturbed. Insanity is a diseased condition which manifests itself in irregular mental action without reference to the intoxication of the subject. It is in evidence that the drinking of alcoholic liquors may and sometimes does cause insanity, but insanity caused by the drinking of alcoholic liquors as distinguished from mere drunkenness will render one incapable of the commission of the crime the same as insanity produced by any other cause. Accordingly, if you find that at the time of the commission of the act charged against the defendant he was insane, it is your duty to acquit him, though you believe that his insanity was caused by the used of or over-indulgence in intoxicating liquors.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Refused. J. M. Clements, Judge.

151 (5) If the defendant was insane at the time of the commission of the act charged against him, he should be acquitted even though you should also find that he was drunk. If, by reason of the diseased condition of his mind, the defendant could not be held answerable for the killing of the deceased had he been sober, he cannot be held answerable for it, because he was drunk when he did it, if you should find that he was drunk.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Refused. J. M. Clements, Judge.

(6) If you entertain a reasonable doubt as to the sanity or insanity of the defendant at the time of the commission of the act charged against him, it is your duty to render a verdict of not guilty, and if you reach such a verdict upon the ground of the insanity of the defendant, you will find and report such fact by your verdict that further proceedings may be taken in the premises as provided by law.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Given as modified. J. M. Clements, Judge.

(7) In considering the question as to whether the defendant was sane or insane at the time he shot the deceased you are in-
152 structed that unless you can harmonize every fact established by the evidence with the theory that he was sane at the time of the shooting it will be your duty to find that he was insane and acquit him accordingly.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Refused. J. M. Clements, Judge.

(8) If you find yourselves unable to determine from the evidence whether the defendant was or was not sane at the time of the shooting, you must acquit the defendant.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Refused. J. M. Clements, Judge.

(9) If you believe from the evidence that the defendant was afflicted with an insane and irresistible desire to drink, originating in a diseased condition of his nervous system, due to inheritance, and you find that by reason of such insane and irresistible desire so originating he drank intoxicating liquors until he became intoxicated to such an extent as that he was unable to distinguish between

right and wrong with reference to the particular act charged against him, he is not criminally liable and should be acquitted.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Refused. J. M. Clements, Judge.

153 (10) If you believe from the evidence that the defendant was afflicted with an insane and irresistible desire to drink, originating in a diseased condition of his nervous system, due to inheritance, and you find that by reason of such insane and irresistible desire so originating he drank intoxicating liquors until he became intoxicated to such an extent as that he was unable to distinguish between right and wrong as to the particular act charged against him; or if he was able to so distinguish he was impelled by an insane and irresistible impulse to the commission of it, he is not criminally liable and should be acquitted.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Refused. J. M. Clements, Judge.

(11) In determining whether the killing is murder or manslaughter, should you be called upon to consider that question, you may take into consideration the intoxication of the defendant, if you believe from the evidence that he was intoxicated at the time of the shooting, as well as provocation, if any is shown, for the purpose of reaching a conclusion as to whether the killing was the result of a heat of passion; and if you find this to be the case you cannot convict the defendant of any higher grade of homicide than manslaughter.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Refused. J. M. Clements, Judge.

154 (12) Though the use of intoxicating liquors, if it had also been long and continuous, and the long and continuous use aided by the recent use rendered the party insane, such insanity would be a defense.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Refused. J. M. Clements, Judge.

(13) A killing which is intentional and unlawful, but wholly from passion inflamed by intoxication, and an imaginary insult, without that degree of thought essential to malice, amounts only to voluntary manslaughter.

C. B. NOLAN,
T. J. WALSH,
Attorneys for Defendant.

Refused. J. M. Clements, Judge.

155 *Instructions Requested by the State, and Refused or Modified by the Court.*

(At the Second Trial in 1904.)

(1) Although the information charges the defendant with the commission of murder in the first degree, you may find him guilty of such crime or of murder in the second degree or of manslaughter, or you may acquit him.

Given as modified. J. M. Clements, Judge.

(2) To make the crime murder in the first degree, the unlawful killing must be accomplished with a clear and deliberate intent to take life. The intent to kill must be the result of deliberate premeditation. It must be founded upon a pre-existing reflection and not upon a sudden heat of passion, sufficient to preclude the idea of deliberation; there need be no appreciable space of time between the intention to kill and the act of killing; they may be instantaneous as successive thoughts of the mind but without the elements of deliberation and premeditation, you cannot find the defendant guilty of murder in the first degree.

Refused. J. M. Clements, Judge.

(3) Murder of the second degree is the unlawful killing of a human being with malice aforethought but without deliberation or premeditation or preconcerted design to kill and the distinguishing feature of the two degrees of murder rests in the absence of
156 deliberation, premeditation and preconcerted design to kill from murder in the second degree.

Given in part and as modified. J. M. Clements, Judge.

(4) If you find from the evidence beyond a reasonable doubt that the defendant is guilty of an unlawful homicide and that such act was done with malice aforethought, then he is guilty of murder, and you must then determine the degree.

(Endorsed:) Given as modified. J. M. Clements, Judge.

(5) If you find from the evidence beyond a reasonable doubt that the defendant committed the crime of murder at the time and place alleged in the information and that such killing was wilful, deliberate and premeditated, then you should find him guilty of murder in the first degree. But if you find that such killing was murder but without deliberation or premeditation, then your verdict should be guilty of murder in the second degree. Malice is essential in either degree.

(Endorsed:) Given as modified. J. M. Clements, Judge.

(6) If you are satisfied by the evidence beyond a reasonable doubt that the defendant at the time and place alleged in the information, unlawfully, feloniously, wilfully, maliciously, deliberately and premeditatively and of his malice aforethought, shot and killed
157 Thomas Crystal in manner and form as charged in the information and that before and at the time of said killing,

the defendant had formed in his mind a felonious, malicious, wilful, deliberate and premeditated design and purpose to take the life of the said Thomas Crystal, and that said killing was done by the defendant in furtherance of such design and purpose, in manner and form as charged in the information, and without any justifiable cause or legal excuse therefor, you should find the defendant guilty of murder in the first degree. If you have a reasonable doubt concerning any of these facts, you must acquit the defendant of murder in the first degree.

(Endorsed:) Given as modified.

(7) Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for not less than ten years, which period may be extended to a life sentence. Manslaughter is punishable by imprisonment in the state prison not exceeding ten years, that is to say, by imprisonment from any period from one day to ten years.

(Endorsed:) Given as modified. J. M. Clements, Judge.

(8) The jury are further instructed that while the law requires that in order to constitute murder of the first degree, that the killing shall be wilful, deliberate and premeditated, still, it does not require that the wilful intent, premeditation or deliberation shall exist for any length of time before the crime is committed; it is sufficient if there was a design and determination to kill distinctly formed in the mind of the defendant at the time the shot was fired;
158 and in this case, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant feloniously shot and killed the deceased as charged in the information, and that at the time the fatal shot was fired, defendant had in his mind a wilful, deliberate and premeditated design or purpose to take the life of the deceased, and that the shot was fired in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, then the jury should find the defendant guilty of murder in the first degree.

(Endorsed:) Refused. J. M. Clements, Judge.

(9) The court further instructs the jury that the information in this case charges the highest grade of murder known to the law, that is murder in the first degree, and under this information, if the evidence requires it as explained in these instructions, the jury may find the defendant guilty of either murder in the first, or second degree or of manslaughter.

(Endorsed:) Given as modified. J. M. Clements, Judge.

(10) If you find the defendant guilty of murder in the first degree, you will so return your verdict. If you find him guilty either of murder in the second degree or manslaughter, you may fix the punishment, if you so desire, or you may leave it to
159 the court. If you find him not guilty of any crime, you will simply say so.

(Endorsed:) Given as modified. J. M. Clements, Judge.

Filed July 11, 1904.

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Instructions of the Court to the Jury.

(At Defendant's Second Trial in 1904.)

(Title of Court.)

(Title of Cause.)

GENTLEMEN OF THE JURY:

The defendant, James S. Keerl, is accused by the State of Montana of the commission of the crime of murder in the first degree, alleged to have been committed at the county of Lewis and Clarke, in the State of Montana, on the 11th day of April, 1902, in that he did on said day and date shoot and kill one Thomas Crystal.

To the information in this case the defendant has pleaded that he is not guilty of any crime therein charged and he thereby puts in issue and denies each and every material allegation in the information, and the court charges you that all of the allegations of said information are material.

3. No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of the killing by the person as alleged are established as inde-
160 pendent facts; the former by direct proof and the latter beyond a reasonable doubt.

(4) In order to convict the defendant of any crime, you must be satisfied that he acted, if you find that he acted at all, feloniously, which means with a guilty mind and evil heart.

5. You are instructed that upon a trial for murder the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

6. Your power of judging of the effect of the evidence is not arbitrary but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds.

7. You are the sole and exclusive judges of the facts in this case and of the credit to be given to the respective witnesses who have testified. In passing upon the credibility of the witnesses, you have a right to take into consideration their prejudices and motives, if you believe that any such have been shown or proven by the evidence in the case. A witness is presumed to speak the truth.
161 This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or his motives, or by contradictory evidence, and you are the exclusive judges of the credibility of the witnesses.

9. You are instructed that you are not at liberty to disregard the evidence of any witness who has not been impeached, and that if any fact has been testified to by any witness who has not been impeached and there is nothing inherently improbable in the statement nor anything in the manner or appearance of the witness to cause his testimony to be discredited, you are bound to consider such fact as established and to take into consideration in forming your verdict.

9½. You are not at liberty to assume the existence of any state of facts unless there is evidence in the case justifying the conclusion; nor can any member of the jury act on any personal knowledge he may have of the facts, or on any information he may have acquired from any source other than from the evidence adduced at the trial.

8. You are instructed that the law presumes a person innocent until he is proved guilty, and this proof must be of a nature to satisfy your minds beyond a reasonable doubt of the guilt of the accused, and the burden is upon the state to *to* make such proof. The mere fact that an information has been filed, charging a person with a crime, does not in itself raise a presumption of guilt. A reasonable doubt, within the meaning of the law, is not a mere imaginary or possible doubt, but a substantial doubt, based
162 upon reason and common sense, and induced by the facts and circumstances attending the particular case, and growing out of the testimony. It is such a doubt as will leave one's mind after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty of the defendant's guilt as charged. The presumption of innocence has the weight and effect of evidence in the defendant's behalf, and this should continue until it is rebutted by competent evidence which displaces any reasonable doubt you might otherwise have of the defendant's guilt.

10. The law presumes that a person intends the ordinary consequences of his voluntary act and that an unlawful act was done with an unlawful intent. These are what are denominated disputable presumptions, however, and may be controverted by other evidence.

The law also presumes a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another. This presumption is deemed conclusive.

A presumption is a deduction which the law expressly directs to be made from particular facts.

11. In every crime of public offense there must exist a union or joint operation of act and intent, or criminal negligence, and you are instructed that the element of criminal negligence does not enter into this case. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind
163 and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity.

Altho' the information charges the defendant with the commission of murder in the first degree, you cannot find him guilty of such crime, you may find him guilty of murder in the second degree or of manslaughter, or you may acquit him.

13. Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.

14. All murder which is perpetrated by means of p-ison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree, and all other kinds of murder are of the second degree.

16. Murder of the second degree is the unlawful killing of a human being with malice aforethought, but without deliberation or premeditation or preconcerted design to kill.

17. If you find from the evidence beyond a reasonable doubt that the defendant is guilty of an unlawful homicide and *and* that such act was done with malice aforethought, then he is guilty of murder.

164 18. If you find from the evidence beyond a reasonable doubt that the defendant committed the crime of murder at the time and place alleged in the information and that such killing was wilful, deliberate and premeditated, or if you find that such killing was murder but without deliberation or premeditation, then your verdict should be guilty of murder in the second degree.

19. Manslaughter is defined by the statute as the unlawful killing of a human being without malice. It is of two kinds,—voluntary, upon a sudden quarrel or heat of passion; involuntary, in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution or circumspection. If, therefore, you find that the defendant killed the deceased unlawfully, but without malice and upon a sudden quarrel or heat of passion, and you also find that he was not insane at the time, you cannot find him guilty of any crime greater than manslaughter.

20. If you find from the evidence beyond a reasonable doubt that the defendant is guilty of an unlawful homicide, you will then determine whether it is murder or manslaughter by the presence or absence of malice aforethought. If you find the act was committed without malice, you must acquit him of the crime of murder.

21. If you find that the defendant is guilty of an unlawful homicide but that the killing was done without malice afore-
165 thought, then the defendant would be guilty of the crime of manslaughter as defined in these instructions.

22. If you are satisfied by the evidence beyond a reasonable doubt that the defendant at the time and place alleged in the information, unlawfully, feloniously, wilfully, maliciously, deliberately and premeditatedly and of his malice aforethought shot and killed Thomas Crystal in manner and form as charged in the information and that before and at the time of said killing the defendant had formed in his mind a felonious, malicious, wilful, deliberate and premeditated

design and purpose to take the life of the said Thomas Crystal, and that said killing was done by the defendant in furtherance of such design and purpose, in manner and form as charged in the information, and without any justifiable cause, or legal excuse therefor, you should find the defendant guilty of murder in the second degree.

23. If you are satisfied by the evidence beyond a reasonable doubt that the defendant at the time and place mentioned in the information, with the revolver therein described, unlawfully, feloniously, wilfully and of his malice aforethought, but without deliberation or premeditation, shot and killed the said Thomas Crystal, in manner and form as charged in the information, and without any justifiable cause or legal excuse therefor, you should find him guilty of murder in the second degree. And if you have a reasonable doubt concerning any of these facts, you should acquit the defendant of murder in the second degree.

24. If you are satisfied by the evidence beyond a reason-
166 able doubt that the defendant at the time and place mentioned in the information, and with the revolver therein described, killed the said Thomas Crystal, feloniously, unlawfully and voluntarily, but upon a sudden quarrel or heat of passion and without malice express or implied, and without any justifiable cause or legal excuse therefor, you should find the defendant guilty of manslaughter. And if you have a reasonable doubt concerning any of these facts, you should acquit the defendant of the crime of manslaughter.

If you believe from the evidence, under these instructions, that the defendant committed the public offense involved in this prosecution, as I herein define it to you, and there is a reasonable ground of doubt in your minds whether he is guilty of murder or manslaughter, he can be convicted of manslaughter only.

26. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for not less than ten years, which period may be extended to a life sentence. Manslaughter is punishable by imprisonment in the state prison not exceeding ten years, that is to say, by imprisonment for any period from one day to ten years.

27. The words "Malice" and "Maliciously" import a wish to vex, annoy or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

28. By "wilful" is meant simply a purpose or willingness to commit the act complained of.

167 29. If you find that defendant killed the deceased unlawfully, but without malice and upon a sudden quarrel or heat of passion, and you also find that he was not insane at the time, you cannot find him guilty of any crime greater than manslaughter.

29½. If you find from the evidence that at some time prior to the shooting, the deceased made an assault upon the defendant of such a character as would naturally and instantly produce in the minds of persons ordinarily constituted the highest degree of exasperation, rage, anger, or resentment, rendering the mind incapable of cool reflection, and that before the passion so engendered had time to

cool so as to permit the defendant to deliberate and reflect with calmness, and because of such provocation and acting upon the influence of such passion and without malice, he shot the deceased, he would be guilty of no grade of homicide greater than manslaughter, even though he were sane at the time he shot the deceased.

30. The court further instructs the jury that if there should appear to have been an interval between the assault or provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder.

31. No precise time in hours is or can be declared to be sufficient within which the passions must be held to have subsided and
168 reason have resumed its control so as to render a killing murder and not manslaughter. Men's temperaments vary greatly as to the duration of hot blood. The question is one of reasonable time, depending upon all the circumstances of the particular case.

32. Under the law of this state certain persons, including lunatics and insane persons, are incapable of committing crime. Accordingly if you find that at the time of the doing of the acts charged in the information against the defendant, he was an insane person, it is your duty to acquit him on the ground of insanity.

32½. The court instructs the jury that insanity in the criminal law is any defect, weakness or disease of the mind, rendering it incapable of entertaining or preventing its entertaining in the particular instance a criminal intent, which constitutes one of the elements of every crime.

Criminal responsibility is to be determined solely by the capacity of the defendant to conceive and entertain the intent to commit the particular crime. If there is no intent, there is no crime.

The question whether the defendant in this case was effected with insanity to such a degree as will excuse him from the commission of the act with which he is charged, is one of fact.

And you are further instructed that you are the exclusive judges of all the facts in this case.

33. It is provided by our law that "No act committed by a person while in a state of voluntary intoxication is less criminal by
169 reason of his being in such a condition." But it will be observed that such intoxication must be *voluntary*. If the defendant drank and became intoxicated not of his own volition but because of a diseased condition of his nervous system which he has inherited and which created in him an irresistible appetite for intoxicating drink, and in consequence of such desire for alcoholic drink, he drank until he became intoxicated, such intoxication would not be voluntary.

34. It is not necessary that the defendant should have been insane continuously for any length of time prior to the commission of the acts charged against him in the information, in order that he should be exempt from criminal responsibility for it; nor is it necessary that all the faculties of his mind should be destroyed, perverted or impaired. If by reason of disease affecting his mind his mental faculties were so impaired or perverted as that he was

unable to distinguish between right and wrong as to the particular act with which he is charged; or if he was able to recognize that it was wrong and yet was impelled by some insane impulse originating in disease to the commission of the act, and he was unable, by reason of the diseased condition of his mind enfeebling his will, or otherwise, to refrain from its commission, he should be acquitted, on the ground of insanity.

35. If the defendant, at the time of the killing, although not insane, was in such a condition of mind, by reason of drunkenness, as to be incapable of forming a specifi- intent to kill, or to do the act that he did do, the grade of his crime would be reduced to
170 manslaughter.

33. The law presumes in the first instance that every man is sane, but that is a presumption which may be overcome. It is not necessary that it be established by a preponderance of the evidence that the defendant was insane at the time of the shooting, but if upon all the evidence you entertain a reasonable doubt as to the sanity of the defendant at the time of the commission of the act charged against him, it is your duty under the law to give him the benefit of that doubt and acquit him on the ground of insanity.

37. If you find from the evidence that the defendant did take the life of Thomas Crystal by the means described in the information, and you are satisfied beyond a reasonable doubt that he was not insane at the time, but you also find that the killing was done in the heat of blood or passion, upon a sudden quarrel, and upon reasonable provocation, and without malice express or implied, and you further find that it was not excusable or justifiable, he cannot be found guilty of any grade of homicide greater than manslaughter.

Heat of passion is a state of violent and uncontrollable rage engendered by a blow or certain other provocation given; a state of mind contradistinguished from a cool state of blood.

Anger is a strong passion or emotion of displeasure or antagonism excited by real or supposed injury or insult to one's self or to others, or by the intent to do such injury.

Passion is a suffering of imposed or inflicted pain; it is
171 that state of mind when it is powerfully acted upon and influenced by something external to itself; the state of any particular faculty which, under such conditions, becomes extremely sensitive or uncontrollably excited; any emotion or sentiment (specifically, love or anger) in a state of abnormal or controlling activity.

The jury should carefully bear in mind the distinction between that mental disease known as "insanity" (which the law out of tenderness for human life and liberty deems sufficient excuse for crime), and a wicked impulse of the evil passion such as "anger" or "passion" which every man is bound under the law to keep in restraint and which does not relieve from responsibility.

38. The law provides that "no act committed by a person while in a state of voluntary intoxication is less criminal by reason of being in such condition. But, whenever the actual existence of any particular purpose, motive, or intent is a necessary element to con-

stitute any particular species of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

40. The court further instructs the jury that the accused is presumed to have been of sane mind at the time of the alleged killing unless the evidence leaves a reasonable doubt in the minds of the jury on that point.

The law presumes that every sane person contemplates and intends the natural, ordinary and usual consequences of his own
172 voluntary acts, unless the contrary appears/ if a man is shown by the evidence beyond a reasonable doubt to have killed another by any act, the natural and ordinary consequences of which would be to produce death, then it will be presumed that the death of the deceased was designed by the slayer, unless the facts and circumstances of the killing or the evidence creates a reasonable doubt whether the killing was done purposely.

41. You are not to consider whether or not the defendant is insane at the present time, but you are to consider him as now sane. A person charged with crime cannot be legally tried for such crime unless he be sane at the time of the trial; hence for the purpose of this trial, he must be considered sane, the issue being whether he was sane at the time he committed the homicide.

43. You are further instructed that the information in this case charges the highest degree of murder known to the law, and under this information, if the evidence requires it, as explained in these instructions, the jury may find the defendant guilty of murder in the second degree, or of manslaughter.

44. If you find the defendant guilty of murder in the second degree, or manslaughter, you may fix the punishment if you so desire, or you may leave the punishment to be fixed by the court. If you find him not guilty of any crime, you will simply say so.

When you retire to your room, you should choose one of
173 your number as your foreman and he should sign any verdict upon which you may agree.

It requires all of your number concurring to find a verdict.

J. M. CLEMENTS, *Judge.*

Filed July 11, 1904.

(Title of Court.)

(Title of Cause.)

There is submitted to you a form of verdict as follows:

We, the jury in the above entitled cause, find for the defendant upon his plea of formal acquittal of the charge of murder in the first degree and of former jeopardy for that offense.

This verdict the court instructs you you are obliged to find under the law and the facts and your foreman will sign the same and you

will return such verdict with any other verdict you may agree upon in the cause.

C. N. NOLAN,
T. J. WALSH,
Def't's Attorneys.

(Endorsed:) Additional Instruction of Court. Filed July 11th, 1904. Finlay MacRae, Clerk.

The same being all of the evidence offered by defendant in support of said special pleas.

174 Be it further remembered, that on the 5th day of July, 1905, an order was duly made and filed extending the time in which to prepare and present for settlement and allowance a Bill of Exceptions in said cause, which said order is as follows:

(Title of Court.)

(Title of Cause.)

Upon motion of counsel for defendant and for good cause the court and the stenographer being busy; and the defendant having asked for ninety days' additional time within which to prepare, serve and file his bill of exceptions in the above cause on appeal to the supreme court.

It is ordered and this does order and grant such defendant ninety days from and after the 5th day of July, 1905, within which to prepare, serve and file bill or bills of exceptions in said cause on appeal to the supreme court. Such time being extended down to and including the 2nd day of October, 1905.

Dated July 5th, 1905.

J. B. LESLIE, *Judge.*

Thereafter on to-wit, the 11th day of September, 1905, a notice was duly served upon the said State of Montana, by service of same upon Chad Spaulding, one of the attorneys for the State in the prosecution of said cause, that the Bill of Exceptions hereinabove set forth would be presented for settlement and allowance, which said notice of settlement of Bill of Exceptions in words and figures
175 is as follows, to-wit:

(Title of Court.)

(Title of Cause.)

To R. W. Berry and C. A. Spaulding, attorneys for the plaintiff above named:

Please take notice, that the above named defendant, on the 15th day of September, 1905, will present to the Honorable Jere Leslie, Judge of the above entitled court, at the court house at the city of

Great Falls, Cascade county, Montana, for settlement and allowance his Bill of Exceptions in the above entitled cause.

W. M. COCKRILL,
T. J. WALSH, &
C. B. NOLAN,
Attorneys for Defendant.

Service of foregoing notice admitted by delivery of copy this 11th day of September, 1905.

R. W. BERRY,
A. C. SPAULDING,
Attorneys for the State of Montana.

Service of the foregoing Bill of Exceptions admitted and delivery of copy of said Bill of Exceptions likewise admitted this 22nd day of August, 1905.

R. W. BERRY,
C. A. SPAULDING,
Attorneys for State.

This is to certify that the foregoing Bill of Exceptions was presented to me for settlement and allowance on the 15th day of
176 September, 1905, and that the said Bill of Exceptions contained so much of the evidence as is necessary and sufficient to present the questions of law upon which the exceptions set forth in said bill were taken and the said Bill of Exceptions is by me certified to be correct and is by me settled and allowed and signed.

Dated October 2d, 1905.

(Signed) J. B. LESLIE, *Judge.*

In the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade.

STATE OF MONTANA, Plaintiff,
vs.
JAMES S. KEERL, Defendant.

Notice of Appeal.

Take notice that the defendant above named hereby appeals to the supreme court of the State of Montana from the judgment of the said district court of the Eighth Judicial District of the State of Montana, in and for the county of Cascade, made and entered against the defendant on the 27th day of June, 1905, adjudging him to be guilty of the crime of manslaughter and sentencing him to
177 imprisonment in the state prison at Deer Lodge, Montana, for the term of 10 years.

C. B. NOLAN,
T. J. WALSH &
GREENE & COCKRILL,
Attorneys for Defendant.

To the State of Montana, and its attorneys, R. W. Berry, and C. A. Spaulding, Esq.

Due personal service of the foregoing notice hereby admitted this 27th day of June. 1905.

R. A. BERRY,
C. A. SPAULDING,
Attorneys for the State of Montana.

178 I, C. C. Proctor, Clerk of the district court of the Eighth Judicial District of the State of Montana, in and for the county of Cascade, do hereby certify that the foregoing is a true transcript of all the papers and proceedings, including the information, plea, minutes of court, verdict, certificate of probable cause, instructions requested by Defendant, instructions of the court, judgment, Bill of Exceptions and notice of appeal.

Witness, my hand and seal of said court, this 7th day of October, A. D. 1905.

(SEAL.)

C. C. PROCTOR,
Clerk of District Court.

179 *Minutes of Supreme Court State of Montana.*

Thirty-first Day of December Term, 1905.

MONDAY, *February* 19, 1906.

Court convened pursuant to recess.
Present: The Hon. Theo. Brantly, Chief Justice.
" " Geo. R. Milburn, Associate Justice.
" " Wm. L. Holloway, Associate Justice.
And the following proceedings among others were had:—

THE STATE OF MONTANA, Plaintiff and Respondent,
vs.
JAMES S. KEERL, Defendant and Appellant.

This cause this day came on for the judgment and decision of the Court. Whereupon on consideration it is now here ordered and adjudged by this Court: That the judgment of the Court below made and entered on the 27th day of June A. D. 1905, be and the same is hereby affirmed.

Opinion by Mr. Justice Milburn. Mr. J. Holloway concurring Mr. Chief Justice Brantly concurring specially.

Minutes of the day's proceedings signed by

THEO. BRANTLY, *C. J.*
GEO. R. MILBURN.
WM. L. HOLLOWAY.

180 No. 2243.

STATE OF MONTANA:

In the Supreme Court, December Term, 1905.

THE STATE OF MONTANA, Plaintiff and Respondent,
v.
JAMES S. KEERL, Defendant and Appellant.

Submitted January 13, 1906; Decided February —, 1906.

Filed February 19", 1906.

JOHN T. ATHEY, *Clerk.*

181 Mr. Justice MILBURN delivered the Opinion of the Court:

This case is on appeal from a judgment of conviction of manslaughter. The defendant was tried three times. The first trial resulted in conviction of murder in the second degree. The judgment was reversed on appeal (State *v.* Keerl, 29 Mont. 508.) Upon the second trial the jury disagreed and was discharged. The third trial resulted in the conviction for manslaughter and the judgment from which the appeal was taken.

The alleged crime was committed in Lewis & Clark county. The third trial was had by change of place of trial, before the district court of the eighth judicial district. Before entering upon the third trial the information was amended in the particulars suggested in the opinion of this court after the first trial. The second trial was upon information without amendment.

The brief of appellant sets out six specifications of error, only one of which was argued orally, the rest being submitted merely upon the briefs. After considering all we find that the one argued orally is the only one worthy of consideration and it is the one which will be noticed herein. The specification which we must consider is: "The court erred in not sustaining the second plea of appellant, that he was once in jeopardy and acquitted through the improper discharge of the jury upon the second trial."

182 Upon the second trial of the defendant the jury, after deliberating upon their verdict for about twenty-four hours, returned into court and having been inquired of by the judge, the jury was discharged and the following minute entry made by the court: "In this cause the jury returned this day into open court, the defendant being present in person and by counsel; whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree, court ordered the jury discharged from further consideration of this cause."

The plea relied upon on the beginning of the third trial is as specified above, the formal plea in writing containing the following language, speaking of the second trial: "The said jury retired to deliberate and having on the 14th day of July, 1904, after the ex-

piration of about twenty-four hours after their retirement to deliberate upon their verdict returned into court, they were questioned by the court as to whether they had agreed and having reported to the court as to the fact was, that they had not agreed, the said jury were by the said court on the said 14th day of July, 1904, without the consent of the defendant and without having arrived at or returned any verdict, discharged, without there existing any necessity for the discharge of the said jury and without there being or existing no reasonable probability that the said jury could or would agree upon a verdict. * * * The said court directed the clerk thereof to enter of record that the court found that there was a reasonable probability that the said jury would not agree and that they were for that reason discharged."

Article V of the Amendments to the Constitution of the United States provides: "* * * Nor shall any person be subject
183 for the same offence to be twice put in jeopardy of life or limb. * * *"

Section 18 of Article III of the Constitution of the State of Montana provides: "* * * Nor shall any person be twice put in jeopardy for the same offence."

If we did not have any provision in our Constitution in regard to former jeopardy, the amendment to the federal Constitution would be all controlling (Bohanan *v.* Nebraska, 118 U. S. 231, 30 L. Co. op., 71). Our Constitution includes all in the federal Constitution on the subject and more, and is not in any wise in contravention thereof. This question has been argued since American courts have been established under our Constitution and has been considered from every possible standpoint, and the opinions are not consistent or reconcilable. Many of the courts have held that after the jury is sworn in a criminal case, the defendant is in jeopardy, and that, except in a case of necessity arising from some act almost amounting to an "act of God," the jury may not be discharged without such discharge amounting to an acquittal. Other courts have held that the discharge lies in the discretion of the court for reasons sufficiently appearing to it. Others have held that in capital cases the discharge of the jury, for reasons of accident or otherwise, will not amount to an acquittal. We think that all of these holdings are inconsistent with the idea that the defendant is in such jeopardy as the Constitution, federal and state, refer to, as soon as the jury is sworn, because if the defendant is in such jeopardy as soon as the jury is sworn, then the death of a juror, or a disagreement of the jury, could not alter the fact. What has happened has happened and cannot be changed without a miracle.

184 Our legislature in the enactment of the Penal Code has, with abundance of caution, undertaken to pass upon this matter in at least four sections. Section 2124 provides: "If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged."

Section 2125 reads: "Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until

they have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is reasonable probability that the jury cannot agree."

Section 2126 provides: "In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried."

Section 2103 reads as follows: "When the defendant has been convicted or acquitted upon an indictment or information for an offense, consisting of different degrees, the conviction or acquittal is a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein."

The legislative construction of what the Constitution means in regard to twice being put in jeopardy is apparent from a reading of section 1356 of the Penal Code, to-wit: "No person can be
185 subjected to a second prosecution for a public offense for which he has once been prosecuted and *convicted or acquitted.*" This implies a verdict and is consistent with the views of the supreme court of the United States as it announced them in United States *v.* Perez, 6 Wheat. 579, respecting a prisoner who was tried for a capital offense, the jury being discharged without agreeing upon a verdict and without the consent of the defendant: "The prisoner has not been convicted or acquitted, and may again be put upon his defense."

We think that the legislature meant by this latter section that a person may not be subjected to a second prosecution if once there has been rendered against him a verdict of conviction or a verdict of acquittal has been returned in his favor. We do not believe that it meant to say that "in case a verdict of conviction or a verdict of acquittal has been rendered, *or* if the jury has been discharged without rendering any verdict, the defendant in a criminal case shall not be prosecuted again for the same public offense." We do not believe that the legislature meant that the discharge of the jury amounted to an acquittal.

The authorities supporting the view that a disagreement of the jury, coupled with a failure to find a verdict, does not operate to bring the defendant within the provision of the Constitution as to former jeopardy, which view we believe to be also that of the legislature and which we think to be in accord with our Constitution and that of the United States, are numerous, a few of which we cite: 3 Current Law, p. 984; United States *v.* Perez, *supra;* Wharton's Criminal Pr. & Procedure (8th ed.), sec. 490; Moseley *v.* The State, 33
Tex. 671; The State *v.* Walker, 26 Ind. 346; Commonwealth
186 *v.* Purchase (Mass.) 2 Pick. 520; 17 Am. & Eng. Ency. Law, p. 585, citations note 1.) One most fully expressing our ideas in clear language, and one which seems to be conclusive and binding upon this court, is that of United States *v.* Perez, *supra.* The case is so similar to the one under consideration that we quote

the opinion in full: "The prisoner, Josef Perez, was put upon trial for a capital offense, and the jury, being unable to agree, were discharged by the court from giving any verdict upon the indictment, without the consent of the prisoner, or of the attorney for the United States. The prisoner's counsel, thereupon, claimed his discharge as of right, under these circumstances; and this forms the point upon which the judges were divided. The question, therefore, arises, whether the discharge of the jury by the court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offense. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had. We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be
187 used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

So far as the reasoning is concerned, it does not make any difference, under the broad provision of our Constitution, as to any charge so it is the same offense, whether the defendant is put upon trial for a capital offense or for murder in the second degree which is not a capital offense under our law.

In conclusion we repeat the language of the federal court in United States *v.* Perez, *supra:* "We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of the opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

The entry made by the court in its minutes as to its action
188 in discharging the jury and the reason therefor, complies with the statute and is sufficient.

The judgment is affirmed.
Affirmed.

GEO. R. MILBURN,
Associate Justice.

I concur:
WM. L. HOLLOWAY,
Associate Justice.

Mr. Chief Justice BRANTLY:

I concur in the conclusion reached in the majority opinion, but do not wish to be understood as giving assent to the proposition that in order for a defendant to sustain his plea of former jeopardy, he must always show a former conviction or acquittal of the same charge by a verdict of a jury. I think it possible that the trial court might so far abuse its discretion in discharging a jury on the ground that it has failed to agree, that the prisoner should be held to be acquitted.

THEO. BRANTLY,
Chief Justice.

189 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA, Respondent,
v.
JAMES S. KEERL, Appellant.

Petition for Rehearing.

Comes now the appellant in the above entitled case and respectfully petitions the court for a rehearing upon the following grounds:

I.

The court by its decision denies the accused a defense given him by the Constitution.

II.

The court by its decision denies the accused a defense given him by section 1947 of the Penal Code.

The court in considering the legislative construction put upon section 18, Article III of the Constitution by section 1356 of the Penal Code, inadvertently overlooked Chapters IV and VII of the Penal Code and wholly failed to give any force to the legislative intention there expressed.

IV.

The court fails to give any force or effect to the word "jeopardy" as used in the legislative acts of this state, distinquishing it from the terms "former acquittal" and "former conviction."

190 V.

The court has inadvertently overlooked the distinction between "real" and "apparent" jeopardy.

The court says in its opinion: "The legislative construction of with the constitution means in regard to twice being put in jeopardy is apparent from a reading of section 1356 of the Penal Code, to-wit: 'No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted.' This implies a verdict and is consistent with the view of the Supreme Court of the United States as it announces them in United States *v.* Perez, 9 Wheat. 579."

There is nothing in the constitution, either of the United States or of Montana, preventing the legislature of Montana granting to the defendant in a criminal prosecution further immunity from prosecution than that given by the constitution. The constitution guarantees certain immunity to all persons accused of crime, but does not prohibit further immunity being, by the legislative branch of the government, extended; rather is its only function, in respect to these matters, a prohibition upon a denial of immunity, a "bill of rights" to the people, that the government shall not *deny* to them certain immunities, but not that the government may not *extend* to the people additional rights to those guaranteed to *to* them by the constitution. It follows, therefore, that we may consider the intent of the legislature from two points of view with reference to the question here involved: (*a*) the point of view taken by the court that the several code sections show the legislative construc-
191 tion put upon the constitutional clause, and (*b*) the point of view that the legislature intended to grant to a person prosecuted for crime an immunity in addition to those granted by the constitution.

Taking up the first point of view, and considering not alone section 1356, but with it sections 1940, 1941, 1947, 1990 and 1991, and a fair inference of the legislative construction of the constitutional provision can be arrived at. Counsel most respectfully submit that to gather the legislative construction from the single section cited in the opinion, and to disregard the other sections of the Penal Code, is too narrow a view and that had the court's attention been directed to *to* the latter section, inadvertently overlooked by the court in reaching its conclusion, a different conclusion would have resulted.

The court is unquestionably right in saying that section 1356, "no person can be subjected to a second prosecution for a public offense for which he has been prosecuted and convicted or acquitted," implies a verdict; but it does not therefrom follow that a person can be tried again in *every* case where a trial has been commenced but no verdict resulted. The section states the rule correctly, but counsel do not believe it states *all* the rule; it is declarative of a principle concerning which there is neither doubt nor conflict, but it does not purport to go any further. Had the legislative intent been to limit the immunity from prosecution to the circumstance of a verdict of acquittal or conviction, it could have been made clear by making the section read, "A person can be subjected to a second prosecution for a public offense except in the case of an

offense for which he has once been convicted or acquitted."
192 It does no violence to this section to hold that even when there is neither a verdict for or against the defendant he may yet be immune from further prosecution. Such a view is consistent with the other provisions of the Penal Code and not in conflict with section 1356, while the construction that puts upon section 1356 the meaning that in every instance where a verdict has not been rendered the defendant may be again prosecuted, is in conflict with or at least renders absurd portions of sections 1940, 1941, 1947, 1990 and 1991 of the Penal Code.

Section 1940 provides for four pleas, each separate and distinct. The third is the old common law plea of "autr-fois convict" or "autrefois acquit," and the particular attention of the court is directed to the fact that these two are joined as one kind of a plea, one class, while another kind of plea is the fourth, "once in jeopardy." Clearly the former section 1356 dealt with and is limited to the third subdivision, and the plea of "once in jeopardy" means something more than the "autrefois acquit or convict" of the common law. The fourth plea is an absurdity if section 1356 is all controlling; it means absolutely nothnig. The care taken to point out the manner of entering the plea of "once in jeopardy" as distinguished from "former acquittal or conviction" by section 1941 shows that, to the legislative mind, it was necessary to carefully preserve the record as to which defense was relied upon, clearly inferring that the issues involved were not similar; and by section 1990 the legislature specifically points out that an issue of fact is raised by three pleas, (1) not guilty; (2) former conviction or acquittal; (3) once in jeopardy. Clearly the same issue is not raised by
193 the "once in jeopardy" plea as by the common law pleas of "autrefois acquit" or "convict."

The issue raised by the plea of "once in jeopardy" must go to the jury (sec. 1991) and be decided by them. It is a defense to the crime charged and for which the defendant is being prosecuted. What then is it that the jury are to consider when this plea is made under our law. Surely there can be no justification in holding that the legislature meant nothing, that this plea is no plea, that it raises no issue, and that it is no defense in the face of the legislative enactment of section 1947, which specifically states that whatever it is that this plea raises, *that is a bar* to any further prosecution, "when the defendant is convicted or acquitted, *or* has been once placed in jeopardy upon an indictment or information, the conviction, acquittal *or* jeopardy is a bar, etc." The jeopardy is as much a bar as a verdict, and section 1947 is as binding on the courts of this state as section 1356, and as they are not in conflict *both* must be given force and effect. The question then raised by this appeal and yet undecided by the court is, what is "jeopardy?"

Counsel respectfully suggest that much of the difficulty surrounding the solution of the question is more apparent than real; that the conflict and apparent inconsistency in the decisions of other jurisdictions, where the matter has been passed upon, has come, not from

any real difficulty in reaching a solution at once reasonable and logical and just and consistent with the position of the courts
194 from the practical point of view, (which requires in certain cases of *necessity* a discharge of a jury without a verdict) but rather from the failure of those courts to carry the analysis of the matter to a conclusion, becoming confused by a consideration of the question of the *time* of jeopardy attaching and the results flowing from such determination, all the while assuming the actual existence of jeopardy,—the very question to be determined. The question, being one of first impression in this state, should, if possible, be solved upon lines consistent both with the legislative enactments above pointed out and with the practical administration of justice as met in the actual necessities of government. Such a solution will not only be of incalculable benefit to the future jurisprudence of our own state, but tend to clear up a question that in the general jurisprudence of the country, it must be admitted, is much obscured.

Counsel conceive that the question, "When does jeopardy commence" should be left until it is first determined, "What is jeopardy?" Jeopardy clearly conveys one dominant idea,—chance, hazard, risk, danger, the balance existing before the fact is ultimately determined. As soon as the ultimate fact has been determined, the jeopardy has ceased; the risk, the hazard, the danger, the balance, has been determined. A man's life is in jeopardy so long as he is traveling on a railway train, we will say; the moment an accident happens, and if he is killed, the jeopardy has ceased, the die has been cast and the result determined. In contemplation of law the moment the prisoner is convicted the matter is determined and if death be the penalty it is considered as having been in-
195 flicted. From the legal point of view the penalty follows as inevitably as the rise of to-morrow's sun. To be sure, as a matter of fact, an escape may occur or a pardon be granted; but these are not within the contemplation of the law. So that a plea of "autrefoi*d* acquit or convict" clearly indicates more than a mere jeopardy, it indicates the determination of that jeopardy, it incicates a condition or circumstances as a defense beyond and more than simply "once in jeopardy," and yet jeopardy itself is a defense. In other words, the danger of, the hazard of, the risk of, the balance of a condition of circumstance that might result in a verdict of conviction is the very thing that is a defense. The jeopardy is the bar regardless of when it commences and, granting there has been a jeopardy, it is immaterial when it commences, it is a bar, but certain it is that it must commence before it ends, and as certain is it that the jeopardy has ended when the verdict has been rendered as it is that there has been a jeopardy preceding the rendition of the verdict.

But if there has been no jeopardy then there is no bar, there is no defense because there has been no hazard, no risk, no danger, no balance as between one of two determination- to be arrived at. If there has been no actual jeopardy there is no bar, *no matter what has taken place*. And it is here counsel submit that there exists a

clear, logical, reasonable and practicable distinction, often lost sight of bet- actual jeopardy and apparent jeopardy. To be in danger of a result presupposes the *possibility* of that result's being accomplished. The jeopardy of being found guilty of an offense presupposes the *possibility* of being found guilty of that offense.

196 Now, if what apparently was a possibility of such a result happening, turns out in fact to never have existed as a possibility at all, it follows that there has been no actual jeopardy, no actual risk of the result, although apparently there was such a risk. The law requires the result to be determined in a certain manner, and in no other manner. If, then owing to certain circumstances, it becomes impossible to determine the result in the manner required, *there has been no actual risk that it would be so determined*, and therefore, no jeopardy. To illustrate: The theory of the law and its actual, just and reasonable practical application requires that the guilt or innocence of a person shall be determined by the judgment of twelve qualified citizens from the evidence presented at the trial. The moment they have been charged with the matter in hand there is an apparent jeopardy of the prisoner, but if a juryman die, then it becomes impossible to determine the question as the law requires it to be determined; what has been apparently a risk of such determination is shown not to have been a risk at all, for while the finiteness of man makes it impossible for him to determine beforehand whether there will or will not be a jeopardy, and time alone can show the actual condition, yet, if the developments as shown by the mere passing of time disclose that the impossibility of a determination owing to no act of the state, but to the happening of some event, or the impossibility of the jury agreeing, then as what is to be will be, there never was a possibility of a determination at that trial from the very commencement of it, although this impossibility was unknown at the commencement. There has been, therefore, no actual jeopardy, and in such event no bar to a further trial.

197 Counsel submit that such an analysis is logical, that it gives to the word "jeopardy" as used in the constitution no *new* or strained meaning, but merely the dominant idea intended to be conveyed by the word; it is a judicial construction that neither robs the word of an accepted and recognized meaning, nor adds to it a meaning not generally recognized; that it is not only consistent with the constitution, but consistent with the distinction our legislature makes between the pleas of "autrefois acquit and convict" and "once in jeopardy;" that it tends to reconcile the apparent inconsistent decisions to the effect that a defendant can be again tried under certain circumstances where there has been no verdict, and yet not be in jeopardy a second time, as, for example, if a defendant has been placed on trial before a jury, and it develops that by reason of a fact not known at the time there is no lawful jury, one being insane, becoming sick, dying, or, the jury being lawful, it cannot agree, for if it is impossible for the jury to agree, it is as impossible to determine the question in the manner required by the law as where a juror dies, and no real jeopardy has attached.

But the defendant after having once been put on trial before a lawful jury is entitled to have that jury decide the matter *if it is possible* for them to do so. And if it is possible for them to agree there has been a real jeopardy although they may have been discharged before they have done so, or otherwise prevented from doing so. If, therefore, follows that a defendant can always be retired unless the jury have been prevented from rendering a verdict
198 when it was possible for them to do so. This prevention must be something over which the state is presumed to have control. An act of God, for instance, could not be said to be such a prevention, it would rather be the happening of an event by the lapse of time which showed the jeopardy apparent rather than real. The same would be true of all the excuses recognized by the so-called "rule of necessity." A careful analysis will show that all the instances of the application of the necessity rule are in fact instances of *impossibilities* of a decision, and not properly the *prevention* of a decision, and that in fact no jeopardy in these instances attaches.

Clearly a judge could not arbitrarily discharge a jury before they had agreed, because he felt they were prejudiced in the defendant's favor, and then hold the defendant to trial again and again until he gets a jury that suits him. Yet such is the logical and only result from a view of jeopardy that means a verdict. It might be said that it cannot be presumed judges are going to so act; true, but constitutions are made with views to possibilities gathered from experiences the people have had, sufferings and injustice endured at the hands of governments. It is against the arbitrary exercise of power by unscrupulous officers of government, whether judicial or otherwise, that the constitutional guaranties are aimed. It is against acts of the unscrupulous, the corrupt, the vicious, or the biased and extreme view of even a conscientious officer that the constitutional guaranties become a refuge, and a protection to the individual, and no presumption should in the least weigh against their full
199 protection being accorded him.

Counsel submit that the meaning of jeopardy as used in the constitution is the hazard, the risk, the chance of a decision (being made as required by law) against the accused; and that once this actually, as distinguished from apparently, attaches to a defendant he cannot again be placed, for the same offense, *in risk* of another decision.

But, even if it be held that the constitutional use of the word jeopardy is narrower than its ordinary meaning, that as used in the constitution it conveys no idea of risk but only of consummated result, a verdict, a determination; yet the legislature, whether wisely and well or not, has seen fit to declare that it means something else and that it is a defense to one accused of crime. This legislative enactment must be given effect and force. It is a right the defendant has, no more to be denied him than any other right given him by that branch of the government that alone (under our form of government) has the right to grant or withhold rights. The decision as rendered operates as a denial of that right, a repeal of a legislative enactment against which no constitutional limitation can be urged.

If it be said that the sections quoted are but the legislative construction of the constitution, and that this court alone has power to construe the constitution, it can be answered that the court in its opinion, in part, based its decision upon the legislative construction as gathered from a single section. But a better answer is that the legislature recognizing that the sole power of construing the
200 constitution rests in this court and not knowing how the word "jeopardy" would be by this court construed, but realizing that the decisions in other states were conflicting, out of an abundance of caution and to assure the accused such full immunity as it deemed him entitled to (and it is sole judge as to how much that should be) enacted these several defenses to clearly show that a defense in addition to "not guilty" and the common law "autrefois acquit or convict" should be available to the defendant, viz: "once in jeopardy."

But counsel submit that the "jeopardy" should be given the meaning it of right has and that no necessity exists for construing into it or out of it, its ordinary dominant idea of risk or danger of result, and to thus construe it in the constitution deprives the citizen of no right intended to be given him nor does it put any obstruction in the way of the practical administration of justice and the proper punishment of crime.

It is, therefore, submitted that "jeopardy" is recognized by constitution and the law of Montana as a defense different from the common law defense of "autrefois acquit or convict," and that the defendant in the case at bar is entitled to the benefit of that defense.

The question then is was there a "real jeopardy" upon the second trial of the appellant? If so when did it commence? Clearly the risk, the hazard, the danger of a determination of the guilt or innocence of the defendant commences the moment this question is placed in the hands of a lawful jury, upon a lawful indictment or
201 information. After once determining what real jeopardy is, all decisions become consistent as to when it commences. It is clear that there is no jeopardy where there has never been a plea, where the information is defective, where the court before which the prisoner is being tried has no jurisdiction, and the text writers and decisions are unanimous as to this, and the reason given is the same as that advanced above, viz., there has been no risk of a decision, for whatever decision might, under such circumstances, be rendered, it would be no decision in law.

Cooley on Constitutional Limitation probably puts the matter in the clearest and most exact language:

"A person is in legal jeopardy when he is *put* upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, and a jury is said to be thus charged when they have been impanelled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will or by a discharge of the jury and a continuance of the cause."

(Cooley's Constitutional Limitations, page 399.)

Bishop expresses himself upon the matter in these words:

"(5) On the completing and swearing of the panel, the indictment being good, and the other preliminary things of record * * * being perfect, the jeopardy of the accused begins; and it is absolute only when the panel is full, for while there is no jury set
202 apart and sworn for the case, the defendant has not been conducted to his jeopardy. But, when, according to the better opinion, the jury is full, sworn, and added to the other branch of the court and all the preliminary things of record are ready for trial, the prisoner has reached the jeopardy from the repetition of which our constitutional guaranty protects him."

"While most of the decided cases clearly sustain the foregoing proposition, there are a few wherein it is laid down, at least in dicta, that jeopardy begins only after verdict rendered. The meaning of the constitution, it is said, is 'that no man shall be twice tried for the same offense, * * * the plain difference between the danger, or jeopardy of a thing, and the thing itself, indicates the error on which these dicta proceed."

"If the jeopardy began only on the rendition of the verdict, the constitutional guaranty could have no effect against a statute enacted to override it. Should the legislature direct what the court might as well do without the direction that whenever the evidence appeared to the judge to be insufficient to convict, he should discharge the jury without taking a verdict, and hold the defendant to answer before another jury, no protection against any number of trials and any amount of harrassment would be afforded to defendants."

"In principle, when by valid steps the state has brought an accused person to trial, and it is ready to be commenced, he is in jeopardy unless some patent or latent thing not under the
203 control of this prosecuting power or to its agent exists, rendering it impossible a verdict good in law should be rendered against him. The valid preparation and instantaneous readiness to begin to receive evidence is the jeopardy,—not the verdict which is the consummation of the proceedings; for the final judgment is the mere formal utterance of the law's approval of what is already done. Now, if the power which brings a man into and controls the jeopardy,—viz. the state and its agent the court—proceeds unlawfully after the jeopardy has attached, it is not sound in legal reasoning to say that this unlawful conduct nullifies the jeopardy. If it did then the process might be repeated forever and the constitutional guaranty be rendered void, and we may presume it was to prevent exactly this sort of thing that the constitutional inhibition was established."

Bishop's New Criminal Law, Secs. 1014, 1015, 1018, 1019, 1045.

The following further extracts from the leading tex- writers are submitted:

"Speaking of the common law doctrine of autrefois acquit and autrefois convict and that they were good pleas in *bat* to an indictment, Section 174 of Clark's Criminal Law, continues:

"This was the common law. By the constitution of the United States, however, it is provided that 'no person shall be * * * subject, for the same offense, to be twice put in jeopardy of life and limb;' and there are similar provisions in the constitutions of the different states. These provisions are broader than the doc-
204 trine of the old common law. Under them there need be no former acquittal or conviction to bar a subsequent prosecution for the same offense. It is sufficient if the accused has once been put in jeopardy."

"After a person has once been put upon his trial before a court of competent jurisdiction, upon an indictment or information which is sufficient to sustain a conviction, and the jury has been charged with his deliverance, he is in jeopardy; * * * Jeopardy only begins when the defendant pleads to the indictment, and has been put upon his trial, and this is not until the jury has been fully impaneled and sworn. * * * as soon, however, as the jury has been sworn, jeopardy begins, and, if after that, the indictment is quashed or a *nolle prosequi* entered the defendant is entitled to his discharge."

"A person can neither be made to suffer punishment twice for the same offense nor to undergo twice the peril of danger of being subjected to such punishment."

"A person is said to have — in jeopardy and cannot again be tried, if he has been placed on trial before a court or tribunal of competent jurisdiction, unless the trial was a nullity, or judgment is arrested, reversed or set trial at the instance of the defendant himself. * * * If because of some manifest necessity the jury was properly discharged without having agreed upon a verdict, or the defendant absented himself, so that the case could not proceed to a verdict, or the term of court had ended before verdict rendered, the accused may be placed on trial again. It is otherwise if the proceedings were erroneously discontinued, though upon the de-
205 defendant's own motion."

Hochheimer on Criminal Law, Secs. 46-47.

"After stating a person cannot be put twice in jeopardy, Section 14 of Moore's Criminal Law, continues:

"The jeopardy commences when the accused has plead to a valid indictment on which he could be convicted for the same offense before a court having jurisdiction of the offense and a jury is empaneled and sworn to try the cause. The jeopardy is not perfect until the panel is full. * * *"

SEC. 15. "If during the trial a *nolle prosequi* is entered, * * * or the court discharges the jury against the consent of the defendant, before they have had reasonable time to deliberate; * * * or the jury separate by permission of the officer without the consent of the court—the legal effect is an acquittal and no second trial can be had."

"'Twice put in jeopardy' and 'twice put on trial' convey to the plainest understanding different ideas. There is a wide difference between a verdict given and jeopardy of a verdict. Hazard, peril,

danger of a verdict cannot mean a verdict given." Duncan J. in Commonwealth *v.* Cook, 6 S. & R. 577.

"Jeopardy attaches at the time the jury is sworn to try the cause, when all the preliminary steps have been taken necessary to the trial."

"When jeopardy has begun, and the jury are unnecessarily discharged without the consent of the prisoner, such discharge of the jury is equivalent to an acquittal, and the prisoner thereby becomes entitled to exemption from further prosecution for the same offense."

206 Hughes on Crim. Law & Pro., Secs. 2587, 2615.

"Jeopardy means danger of punishment. And a man is considered to have been put in jeopardy when a valid and sufficient indictment or information has been legally found against him and duly presented to a court of competent jurisdiction over both the person and the offense, and thereupon he has been arraigned and has pleaded, and a lawful jury has been empaneled and charged to try the case and render a verdict."

Black on Const. Law, Sec. 180.

"In law the term 'jeopardy' is used to designate the *danger* of conviction and punishment which the defendant in a criminal action incurs when a valid indictment has been found and a petit jury has been impaneled and sworn to try the case and give a verdict. But according to the theory adhered to by some jurists a person accused of crime is not put in jeopardy until he has been tried and a verdict of guilty or not guilty rendered."

17 Eng. — Am. Ency. of Law, 2d ed. 581.

"The general rule established by the preponderance of judicial opinion and by the best considered cases is that when a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned and has pleaded, and a jury has been empaneled and sworn, he is in jeopardy, but until these things have been done jeopardy does not attach. But in some jurisdictions it is held that jeopardy does not attach until a verdict, either of acquittal or conviction has been rendered."

From the note above it appears that Louisiana, Maine and New York seem to be the only states which hold the latter

207 view.

17 Eng. & Am. Ency. 585.

"There must be an issue joined before jeopardy can attach; therefore until the defendant has been arraigned and has pleaded he is not in jeopardy and this is so even though the jury has been impaneled and sworn and witness examined, and even though a verdict of guilty has been rendered."

Id. Page 592.

"The submission of an indictment to the grand jury and the examination of witnesses before them, or even the finding of the indictment, does not amount to a putting in jeopardy; but the accused

is placed in jeopardy where he has pleaded and has been put on trial before a court of competent jurisdiction upon an indictment valid and sufficient in form and substance to sustain a conviction and the jury has been sworn and impaneled and charged with the case. Jeopardy does not attach until an issue has been joined, and therefore a defendant has not been put in jeopardy where he has not pleaded, or where he has been permitted to withdraw his plea."

12 Cyc. 261.

"Jeopardy is the *peril* in which the defendant is put when he is regularly charged with crime before a tribunal properly organized and authorized to try him; the situation of a prisoner when a trial jury has been empaneled and sworn to try the case upon a valid indictment or information and such jury has been charged with his deliverance."

Southerland's Notes on the Constitution, Amendment V, page 632.

208 The final question then is, does it appear from the record before this court that there was a "real" or only an "apparent" jeopardy? Does it appear that it was impossible for the jury to agree and therefore that at the second trial there was no real jeopardy, but only an apparent one? It is submitted that this court must determine this question from the record before it, that if it does not appear that it was impossible for the jury to agree there was jeopardy, and the defendant is entitled to the benefit of his plea and the constitutional guaranty of immunity from further prosecution.

Undoubtedly in most cases a jury could be coerced into an agreement, as, by starvation or other harsh measures. But counsel submit that "impossibility to agree" means that the accused is entitled to a verdict of the jury acting upon the evidence and not induced by other causes and that when it is impossible for them to reach an agreement except from other causes, a discharge is proper, and that no "real" jeopardy has occurred. Counsel also submit that a probability that they will not agree is not a determination of the impossibility of their agreeing, that the impossibility of their agreeing is only determined when there is no reasonable probability that they will agree, and that it is not determined when there exists merely a reasonable probability that they will not agree. On this question counsel respectfully refer to the brief of appellant now on file, and counsel most respectfully pray, in view of the general importance of the question involved, in view of the fact that the decisions of various jurisdictions are somewhat in conflict, in view of the fact that it is a case of first impression in this state, and in view of the further fact that counsel, both in brief on file and in the argument made,

209 have evidently not gotten clearly before the court their exact contention on this very important principle, that an opportunity be again accorded counsel to present the matter, to the end that the final decision of the court may be given only after a full and clear understanding of the exact contention of the appellant herein.

Respectfully submitted,

C. B. NOLAN,
T. J. WALSH, &
E. B. HOFFMAN,
Counsel for Appellant.

Copy of the foregoing petition for a rehearing received this 6th day of March, 1906.

ALBERT J. GALEN,
Attorney General,
By E. M. HALL, *Ass't.*

210 *Minutes of Supreme Court, State of Montana.*

Sixteenth Day of March Term, 1906.

MONDAY, *April 30th,* 1906.

Court convened pursuant to recess.
Present: The Hon. Theo. Brantly, Chief Justice.
" " Geo. R. Milburn, Associate Justice.
" " Wm. L. Holloway, Associate Justice.
And the following among other proceedings were had to-wit:

THE STATE OF MONTANA, Plaintiff and Respondent,
vs.
JAMES S. KEERL, Defendant and Appellant.

This cause this day came on for the judgment and decision of the Court on the motion for a rehearing herein. Whereupon, on consideration it is now here ordered and adjudged by this Court: That the former opinion herein is modified to conform to the views herein expressed, and the motion for rehearing is denied. Opinion by Mr. Justice Milburn. Mr. Justice Holloway concurring. Mr. Chief Justice Brantly concurring in the result.
Minutes of the days proceedings signed by

THEO. BRANTLY, *C. J.*
W. L. HOLLOWAY.

211 No. 2243.

STATE OF MONTANA:

In the Supreme Court, March Term, 1906.

THE STATE OF MONTANA, Plaintiff and Respondent,
v.
JAMES S. KEERL, Defendant and Appellant.

On Motion for Rehearing.

Submitted March 19, 1906; Decided April —, 1906.

Filed April 30, 1906.

JOHN T. ATHEY, *Clerk.*

212 Mr. Justice MILBURN delivered the Opinion of the Court:

On motion for rehearing. Counsel invites the attention of the court to certain sections of the Penal Code which were not cited by the court in the former opinion, desiring to convince us that the word "jeopardy," as used in the legislative Acts of the state, should

be understood as meaning more than former acquittal or former conviction, and saying that we have inadvertently overlooked the distinction between real and apparent jeopardy. After further consideration of this difficult matter, upon which the courts and text writers of the country are so hopelessly divided, we are of the opinion that what we said in the former opinion should be amplified, but not that our conclusion should be changed.

Section 1940 of the Penal Code is as follows: "There are four kinds of pleas to an indictment or information. A plea of—1. Guilty. 2. Not Guilty. 3. A former *judgment* of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty. 4. Once in jeopardy."

Section 1941 of the same Code provides: "Every plea must be oral, and entered upon the minutes of the court in substantially the following form: * * * 3. If he plead a former conviction or acquittal: 'The defendant pleads that he has already been convicted
(or acquitted) of the offense charged by the *judgment* of the
213 court of —— (naming it), rendered at —— (naming the place) on the — day of ——.' 4. If he pleads once in jeopardy: 'The defendant pleads that he has been once in jeopardy for the offense charged' (specifying the time, place and court)."

Section 1947 reads: "When the defendant is *convicted* or *acquitted, or has been once placed in jeopardy* upon an indictment or information, the conviction, acquittal or jeopardy, is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under the indictment or information."

Section 1990 is as follows: "An issue of fact arises: 1. Upon a plea of not guilty. 2. Upon a plea *of a former conviction or acquittal* of the same offense. 3. Upon a plea *of once in jeopardy.*"

Section 1356 provides: "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."

Section 2126 reads as follows: "*In all cases* where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried." This last section, which was not called to our attention by counsel, supports the position taken in the former opinion.

The language of the statute in these several sections is not clear, and the sections are apparently somewhat conflicting, but, when read
together, are not impossible to understand. Section 1940 in
214 the third subdivision cited, provides that "a former *judgment* of conviction or acquittal of the offense charged" may be pleaded, but, as we see, other sections speak of *conviction* or *acquittal* merely. The special plea of former *judgment of conviction or acquittal*, or of former *conviction or acquittal*, seems to be superfluous, for the reason that the plea of "once in jeopardy" can be made. The latter includes the plea of former conviction or acquittal and a judg-

ment of conviction or acquittal. Certainly, if a man has been convicted and a judgment of conviction has been entered for a felony, he has been "once in jeopardy." We think that the plea of "once in jeopardy" was added to include other cases of jeopardy than those of judgment of conviction or acquittal. In section 2126 it appears conclusively that the defendant may not be tried again if he has been discharged during the progress of the trial or after the case has been submitted to the jury, although the jury may have been discharged or prevented from giving a verdict by reason of an accident or other cause. Such a discharge of the prisoner amounts to an acquittal and brings him within the provision of section 1356, although there has not been any judgment of acquittal as mentioned in section 1940. Section 2126 seems to expressly provide for the case now under consideration, for it says that in *all* cases of a disagreement of a jury, the prisoner may be tried again, unless he has been discharged as aforesaid. In case of the discharge of the jury for disagreement, as in the case of granting a new trial, the jeopardy is the same continuing jeopardy from the beginning of the trial after the swearing in of the first jury, until the particular same case is determined. There is only one jeopardy; a second jeopardy can only be pleaded in another case. A new trial is the re-examination of the facts under the same plea of not guilty, on the same information or indictment.

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Certainly there has not been any judgment of conviction or acquittal in the case before us. There has not been any conviction without a judgment. Has there been an acquittal without a judgment? What is an acquittal? The appellant certainly has not been adjudged to be acquitted. This question is not the simple one that it appears to be. The word "acquittal" is said to be *"verbum equivocum."* For some of the equivocations see Words and Phrases, Vol. 1, page 114. The definition expressed or implied in our former opinion in this case is too narrow, although supported by authority. We consider that one is acquitted if, after he has been arraigned, and the trial has been begun upon a valid indictment or information, he is discharged by a competent court before verdict. (Penal Code, section 2126.) He has been in jeopardy. Such is not the situation in the case before us.

We are also of the opinion that after a verdict or a judgment of conviction or acquittal, the defendant in a criminal case has been in jeopardy and may not be tried again for the same offense, except in a case of a new trial which has been granted or ordered. The jeopardy which is forbidden is a new jeopardy. In the case before us the defendant, when he went to trial the third time, was in the same jeopardy that he was in when the first trial was had. The continuance of the jeopardy is not a new jeopardy. A mistrial or a new trial secured by plaintiff or defendant, continued the jeopardy and does not renew it. (*If this court was correct* in the two cases in which new trials were ordered in criminal cases on appeal by the prosecution (State *v.* Herron, 12 Mont. 230, 300; State *v.* Mjelde, 29 Mont. 490), then, on a new trial, the jeopardy would not be a new one but a continuation of the old danger.

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(This remark is made by the writer of this opinion on his sole responsibility and not with the concurrence of the other members of the court. He has now a doubt as to the logic and correctness of those two opinions, in the latter of which he concurred.)

In the Perez case cited, the federal supreme court decided that when a court discharged a disagreeing jury in a capital case, the defendant was not put again into jeopardy on a new trial. It made no exception in a supposed case of abuse of discretion. This decision of the highest court of the country is strongly persuasive. Section 2126 settles it.

The defendant here was not acquitted. He was not twice put in jeopardy. There was not a new jeopardy. The record of the court as to the discharge of the jury was statutory and sufficient as to the reason why the jury was discharged and as to the necessity for discharging them.

Mr. Justice Holmes in his dissenting opinion in Kepner *v.* United States, 195 U. S. at page 134, while being of the opinion that the defendant should have stood convicted on the trial by the Philippine appellate court, lays down certain general principles applicable to all cases: He says: "It seems to me that logically and ra-
217 tionally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree. (United States *v.* Perez, 9 Wheat. 579; see Simmons *v.* United States, 142 U. S. 148; Logan *v.* United States, 144 U. S. 263; Thompson *v.* United States, 155 U. S. 271.)

The former opinion herein is modified to conform to the views herein expressed, and the motion for rehearing is denied.

Rehearing denied.

(Signed) GEO. R. MILBURN,
Associate Justice.

I concur:
WM. L. HOLLOWAY,
Associate Justice.

Mr. Chief Justice BRANTLY: I concur in the result reached.
THEO. BRANTLY,
Chief Justice.

218 STATE OF MONTANA,
County of Lewis and Clark, ss:

I, John T. Athey, Clerk of the Supreme Court of the State of Montana, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of State of Montana, Plaintiff and Respondent, *vs.* James S. Keerl, Defendant and Appellant, and also of the opinion of the Court rendered herein, also

of the order of judgment, Petition for re-hearing, Order denying petition, and opinion on rehearing, as the same now appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Montana, this 18/ day of June A. D. 1907.

[Seal Supreme Court State of Montana.]

JOHN T. ATHEY,
Clerk of Supreme Court State of Montana.

219 In the Supreme Court of the State of Montana.

STATE OF MONTANA, Defendant in Error,
vs.
JAMES S. KEERL, Plaintiff in Error.

Assignment of Errors.

Comes now James S. Keerl, plaintiff in error, by Walsh & Nolan, his attorneys, and says that the record and proceedings in the above entitled cause show there is manifest error in this, to-wit:

I.

The Supreme Court of the State of Montana erred in holding that the district court properly overruled the motion of the plaintiff in error to vacate and set aside the order granting leave to file the information against plaintiff in error, and asking the court to quash the same, and to set aside the order of arrest, and to discharge plaintiff in error.

II.

That the said court erred in holding that the judgment of the district court was right and in affirming the same.

III.

That the said court erred in holding that the district court properly refused to sustain the second plea of plaintiff in error that he was once in jeopardy, and acquitted through the improper discharge of the jury on the second trial.

IV.

That the said court erred in holding that the district court properly refused to sustain the second plea of plaintiff in error that
220 he was once in jeopardy, and acquitted through the improper discharge of the jury upon the second trial, because that after the jury had retired to deliberate upon their verdict, and had returned into court and reported that they had not agreed upon their verdict they were discharged by the court without the consent of the plaintiff in error, upon it appearing to the court simply that there was reasonable probability that the said jury would not agree.

V.

That the said court erred in holding that the district court properly refused to sustain the second plea of plaintiff in error after he was once in jeopardy and acquitted, through the improper discharge of the jury upon the second trial, because that after the jury had retired to deliberate upon their verdict, and had returned into court and reported that they had not agreed upon their verdict, they were discharged by the court without the consent of the plaintiff in error, without it appearing that there was no reasonable probability that the said jury would agree.

Wherefore, the said plaintiff in error prays that the said decision of the Supreme Court of the State of Montana be reviewed, and that the said court be directed to enter an order reversing the judgment herein and discharging the plaintiff in error from custody.

WALSH & NOLAN,
Attorneys for Plaintiff in Error.

220½ [Endorsed:] No. 2243. In the Supreme Court of the State of Montana. State of Montana, Defendant in Error, *vs.* James S. Keerl, Plaintiff in Error. Assignment of Errors. Filed April 26", 1907. John T. Athey, Clerk. Walsh & Nolan, Helena, Mont., Attorneys for Plaintiff in Error.

221 In the Supreme Court of the State of Montana.

STATE OF MONTANA, Defendant in Error,
vs.
JAMES S. KEERL, Plaintiff in Error.

Petition for Writ of Error.

Now comes your petitioner, James S. Keerl, by Walsh & Nolan, his attorneys, and respectfully represents that in the above entitled cause or proceeding, which is a criminal proceeding instituted by an information wherein the said James S. Keerl, plaintiff in error, was charged with the crime of murder in the first degree, there was drawn in question the validity of sections 2120 to 2127, both inclusive, and particularly the validity of section 2125 and other provisions of the Penal Code (1895) of the State of Montana, their validity being questioned under the provisions of Section 1, of the 14th Amendment to the Constitution of the United States, and the decision of the said Supreme Court of the State of Montana was in favor of their validity.

And your Petitioner further respectfully represents that in said cause or proceeding, as appears by the pleadings and the record, after the filing of the information against the said James S. Keerl and the making of the order that he be held without bail, and after he was arrested and brought into court, he filed a motion asking the court to vacate and set aside the order that had been made granting leave to file the information and asking the court to quash the same

and to set aside the order of arrest and to discharge the defendant, for that the information under which he was held to answer was not supported by oath or affirmation except that it was verified by
222 the County Attorney "to the best of his knowledge, information and belief", the defendant insisting that to hold him to answer without the charge against him being verified by oath or affirmation would be to deprive him of his liberty without due process of law, which said motion was by the court overruled and an exception taken.

And your petitioner further respectfully represents that in said cause or proceeding it appears by the pleading and the record that, on the second trial of said cause in the County of Lewis and Clark, State of Montana, and on the 14th day of July, 1904, the jury was, without the consent of the plaintiff in error discharged by the court on it appearing to the court that there was merely reasonable probability that the said jury could not agree and without it appearing that there was no reasonable probability that the said jury could or would agree. That thereafter, on the 21st day of July, 1904, in said Lewis and Clark County, the original information was amended and on this amended information, the appellant was arraigned in Cascade County, Montana, on the 5th day of June, 1905, to which County the said cause had been transferred for trial, and the plaintiff in error interposed the plea of once in jeopardy. This plea, setting up that defendant had been once in jeopardy, spoke of the proceedings in the second trial, hereinbefore referred to, in the following language: "After the said jury retired to deliberate, and, having on the 14th day of July, 1904, after the expiration of about 24 hours after their retirement to deliberate upon their verdict, returned into court, they were questioned by the court as to whether they had agreed and, having reported to the court that, as the fact was, they had not agreed, the said jury were discharged by the court on the said 14th day of July, 1904, without the consent of the defendant and without having arrived at or returned any verdict, without there existing any necessity for the discharge of the said jury and without there being or existing no reasonable probability that the said jury could or would agree upon a verdict. That the said court directed the clerk thereof to enter of record that the court found that there was a reasonable probability that the said
223 jury would not agree and for that reason they were discharged."

That after the interposition of said plea, a third trial was had, which resulted in the conviction of the plaintiff in error of the crime of manslaughter. That on the verdict so rendered by the jury so finding the plaintiff in error guilty of manslaughter a judgment of conviction was rendered and entered sentencing appellant to imprisonment in the penitentiary for ten years. That from this judgment an appeal was taken to the Supreme Court of the State of Montana wherein error was assigned in that the court erred in overruling the motion of plaintiff in error to vacate the order granting leave to file the information and asking the court to quash the same and to set aside the order of arrest and to discharge the de-

fendant, as aforesaid, the same operating to deprive the plaintiff in error of his liberty without due process of law. That further error was assigned on said appeal in that the court erred in not sustaining the second plea of plaintiff in error, that he had been once in jeopardy and acquitted through the improper discharge of the jury as, aforesaid, upon the second trial.

That on said appeal the discharge of the jury was upheld under the provisions of sections 2120 to 2127, both inclusive, and especially of section 2125 of the Penal Code (1895) of the State of Montana and the judgment of the lower court was affirmed. That on said appeal the validity of said sections of the Penal Code and the action of the court on the motion of plaintiff in error as aforesaid were drawn in question on the ground that said sections and the said action of the court were repugnant to the constitution of the United States and deprived the plaintiff in error of his liberty without due process of law. That the decision of the Supreme Court of the State of Montana was in favor of the validity of said sections and of the action of the court.

And your petitioner further respectfully represents that in the records and proceedings and also in the rendition of the said
224 judgment in the above entitled cause or proceeding, which is in the *Supre* Supreme Court before you, manifest error hath happened in the matters and things in your petitioner's Assignment of Errors herein more specifically set forth, to the great damage and injury of your petitioner.

Wherefore your petitioner prays that it may please your honor to grant unto your petitioner a Writ of Error to remove the said cause and the record thereof into the Supreme Court of the United States to the end that the error, if any hath happened, may be duly corrected and full and speedy justice done your petitioner.

And your petitioner, as in duty bound, will ever pray.

WALSH & NOLAN,
Attorneys for Petitioner, Plaintiff in Error.

Let the Writ of Error issue as above prayed for upon the Petitioner filing with the clerk of this Court a good and sufficient bond conditioned to prosecute such writ and answer all costs in the sum of Five Hundred Dollars, and the same being duly approved.

THEODORE BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

224½ [Endorsed:] No. 2243. In the Supreme Court of the State of Montana. State of Montana, Defendant in Error, *vs.* James S. Keerl, Plaintiff in Error. Petition for Writ of Error. Filed April 26" 1907. John T. Athey, Clerk. Walsh & Nolan, Helena, Mont. Attorney- for Plaintiff in Error.

225 In the Supreme Court of the State of Montana.

STATE OF MONTANA, Defendant in Error,
vs.
JAMES S. KEERL, Plaintiff in Error.

Bond on Writ of Error.

Know All Men by These Presents, That The United States Fidelity and Guaranty Company, of Baltimore, Maryland, is held and firmly bound unto the defendant in error, the State of Montana, in the sum of Five Hundred Dollars ($500.00), for the payment of which well and truly to be made we bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seal and dated this 26th day of April, 1907.

Whereas, the above named James S. Keerl, plaintiff in error, has obtained a writ of error and citation directed to the said state of Montana, the defendant in error, citing and admonishing the said state of Montana to be present and appear within sixty days after the date thereof to show cause, if any there be, whether the judgment rendered in the above-entitled action or proceeding by the Supreme Court of the State of Montana, should not be reversed:

Now Therefore, the condition of this obligation is such
226 that if the said James S. Keerl shall prosecute the said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be null and void; otherwise to remain in full force and effect,

THE UNITED STATES FIDELITY AND
[SEAL.] GUARANTY COMPANY,
By F. McKENNAN, *Its Attorney in Fact.*

The foregoing bond and surety are approved this 26 day of April, 1907.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attested as to approval and approved by:
[SEAL.] JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

227 *Writ of Error to the Supreme Court of the United States.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the State of Montana, before you or some of you, being the highest

court of law or of equity of the said state in which a decision could be had in the said suit or proceeding, between the State of Montana, defendant in error, and James S. Keerl, plaintiff in error, wherein was drawn in question the validity of a statute or treaty of, or an authority exercised under the laws of the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said James S. Keerl, plaintiff in error, and to his great injury, as by his complaint appears, we, being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judg-
228 ment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same in Washington, in the said Supreme Court, within sixty days from the date hereof, that, the records and proceedings aforesaid, being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, this 26th day of April, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the 131st.

[Seal United States Circuit Court, District of Montana.]

GEO. W. SPROULE,
Clerk of the United States Circuit Court,
District of Montana,
By C. R. GARLOW,
Deputy Clerk.

The above writ of error is hereby allowed by:

THEODORE BRANTLY,
Chief Justice of the Supreme Court
of the State of Montana.

Service of the foregoing writ of error and receipt of copy admitted this 29th day of April, 1907.

ALBERT J. GALEN,
Attorney General of the State of Montana.

____ ____,
Governor of the State of Montana.

228½ [Endorsed:] No. 2243. In the U. S. Circuit Court, District of Montana. State of Montana Defendant in Error *vs.* James S. Keerl, Plaintiff in Error. Writ of Error. Filed April 27" 1907. John T. Athey, Clerk. Walsh & Nolan, Helena, Mont. Attorney- for Plaintiff in Error.

229 STATE OF MONTANA,
County of Lewis and Clark, ss:

I, John T. Athey, Clerk of the Supreme Court of the State of Montana, do hereby certify that there was lodged with me as such clerk, on April 27, 1907, in the cause entitled State of Montana, Plaintiff and Respondent, *versus* James S. Keerl, Defendant and Appellant.

1. The original bond of which a copy is herein set forth.
2. Copies of the writ of error,—one as herein set forth, and one on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Montana this 18th day of June 1907.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk of Supreme Court, State of Montana.

230 In the Supreme Court of the State of Montana.

STATE OF MONTANA, Defendant in Error,
vs.
JAMES S. KEERL, Plaintiff in Error.

Citation.

United States of America to the State of Montana, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Montana, wherein the said State of Montana is defendant in error, and James S. Keerl is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said James S. Keerl, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Theodore Brantly, Chief Justice of the Supreme Court of Montana, this 27 day of April, in the year of our Lord one thousand nine hundred and seven.

[Seal Supreme Court, State of Montana.]

THEODORE BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attest:
JOHN T. ATHEY, *Clerk.*

Service of the foregoing citation and receipt of copy admitted this 29th day of April, 1907.

ALBERT J. GALEN,
Attorney General of the State of Montana.

——— ———,
Governor of Montana.

230½ [Endorsed:] No. 2243. In the Supreme Court, of the State of Montana. State of Montana, Defendant in Error, *vs.* James S. Keerl, Plaintiff in Error. Citation. Filed April 27" 1907. John T. Athey, Clerk. Walsh & Nolan, Helena, Mont. Attorney- for Plaintiff in Error.

231 STATE OF MONTANA,
County of Lewis and Clark, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified copy of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Montana, this June 18, 1907.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk Supreme Court of Mont.

Endorsed on cover: File No. 20,770. Montana supreme court. Term No. 113. James S. Keerl, plaintiff in error, *vs.* The State of Montana. Filed June 26, 1907. File No. 20,770.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

JAMES S. KEERL,

Plaintiff in Error,

vs.

THE STATE OF MONTANA,

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

BRIEF OF PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

The plaintiff in error was charged in the district court of Lewis and Clark County, State of Montana, by information, of the crime of murder in the first degree, was tried and convicted of murder in the second degree, and sentenced to imprisonment for life.

Transcript, page 75.

The judgment was reversed by the Supreme Court of Montana, and he was again put upon trial. The case having been submitted to the jury, they retired and afterwards re-

turned into court, whereupon proceedings were had resulting in the court's making the following order shown by the record, to-wit: "It satisfactorily appearing to the court *there is a reasonable probability that the jury cannot agree,* court ordered the jury discharged from further consideration of this cause and that the defendant be remanded to the custody of the sheriff."

Transcript, pages 83-84.

He was put upon trial a third time, but before the trial he interposed a plea of former jeopardy, reciting the facts of the former trials and concluding as follows:

> "The said jury retired to deliberate and having on the 14th day of July, 1904, after the expiration of about 24 hours after their retirement to deliberate upon their verdict, returned into court, they were questioned by the court as to whether they had agreed, and having reported to the court as the fact was, that they had not agreed, the said jury were, by the said court on the said 14th day of July, 1904, without the consent of the defendant and without having arrived at or returned any verdict, discharged, without there existing any necessity for the discharge of the said jury and without there being or existing no reasonable probability that the said jury could or would agree upon a verdict, and without its appearing to the court that there was no reasonable probability that the said jury could or would agree upon a verdict. That upon the said court's having so questioned the said jury as to whether they had agreed, the said court directed the clerk thereof to enter of record that the court found that there was a reasonable probability that the said jury would not agree and that they were, for that reason, discharged; that save as aforesaid no adjudication or record was made concerning the necessity for or of the cause of the discharge of the said jury and that no necessity for or of the cause of such discharge of the said jury, existed save as recited in the said entry so made

and directed to be made. Now the defendant asserts that for the reasons hereinbefore in this special plea set forth he ought not again to be tried for the offense or for any offense charged in the information herein and that to do so, in view of the facts aforesaid, would be to place him twice in jeopardy for the same offense contrary to the provisions of the Constitution of the State of Montana, and that any judgment of conviction herein or any proceedings further to hold the defendant to answer to the said information, or the charge therein, or to put him upon trial for the same would be to deprive him of his liberty without due process of law."

Transcript, pages 5-6,

thus invoking the protection of the 14th Amendment to the Constitution of the United States. To this plea the state replied, admitting the facts in relation to the discharge of the jury, saying in reference thereto:

"The said jury retired to deliberate upon their verdict, and having on the 14th day of July, 1904, after the expiration of about twenty-four hours after their retirement to deliberate as aforesaid, returned into court and reported to said court their inability to agree upon a verdict in said cause, and thereupon and on said 14th day of July, 1904, it appearing satisfactorily to said court that there was reasonable probability that said jury could not agree, and after the making and entering of an order by said court in the records of said court in said cause that it satisfactorily appeared to said court that there was a reasonable probability that said jury could not agree, said jury was by said court discharged from further consideration of said cause; that at the time said jury was discharged as aforesaid the said defendant was present in court in person and was then and there represented by his counsel who were likewise present in court, and no objection was interposed by said defendant or his said counsel at said time or at all to the discharge of said jury as aforesaid."

Transcript, page 38.

But the court instructed the jury to return a verdict in favor of the state on this plea of former jeopardy, saying:

> "In addition to the plea of not guilty, the defendant has pleaded in substance that he has been acquitted of every grade of the offense charged in the information, by the judgment or order of the district court of the First Judicial District of the State of Montana in and for the county of Lewis and Clark on the 14th day of July, 1904, by the alleged premature discharge of the jury then impanelled in this cause therein, then pending. This plea is denominated defendant's second plea. You are instructed to return a verdict in favor of the State as to this plea."

Instruction No. 52, Transcript, page 31.

This it did.

Transcript, page 17.

The jury also found the plaintiff in error guilty of manslaughter,

Transcript, page 18,

and he was sentenced to be confined in the state prison for a period of ten years.

Transcript, page 19.

From this judgment of conviction he appealed to the Supreme Court of the State of Montana, by which tribunal it was affirmed.

Transcript, page 104.

A petition for a rehearing was denied,

Transcript, page 115,

and a writ of error to this court was sued out.

Transcript, pages 121-122.

And now the plaintiff in error makes the following

II.

SPECIFICATION OF ERRORS.

1. The Supreme Court of the State of Montana erred in holding that the district court properly refused to sustain the second plea of plaintiff in error that he was once in jeopardy, and acquitted through the improper discharge of the jury on the second trial.

2. The Supreme Court of the State of Montana erred in holding that the district court properly refused to sustain the second plea of plaintiff in error that he was once in jeopardy, and acquitted through the improper discharge of the jury upon the second trial, because that after the jury had retired to deliberate upon their verdict, and had returned into court and reported that they had not agreed upon their verdict they were discharged by the court without the consent of the plaintiff in error, upon it appearing to the court simply that there was reasonable probability that the said jury would not agree.

3. The Supreme Court of the State of Montana erred in holding that the district court properly refused to sustain the second plea of plaintiff in error after he was once in jeopardy and acquitted, through the improper discharge of the jury upon the second trial, because that after the jury had retired to deliberate upon their verdict, and had returned into court and reported that they had not agreed upon their verdict, they were discharged by the court without the consent of the plaintiff in error, without it appear-

ing that there was no reasonable probability that the said jury would agree.

III.

ARGUMENT.

The jury was discharged on the second trial after the cause had been submitted to them, by the court, pursuant to the provisions of Section 2125 of the Penal Code of Montana, as follows:

> "Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is reasonable probability that the jury cannot agree."

The plaintiff in error contends that a discharge of the jury without a verdict under conditions such as are contemplated in this statute operates as an acquittal and that, in view of constitutional restrictions, he was not subject to further trial or prosecution for the offense for which he was on trial before the jury so discharged.

Contending that he was acquitted by the action of the court in so discharging the jury, he insists that all subsequent proceedings against him are in violation of the 14th Amendment to the Constitution of the United States, and operated to deprive him of his liberty without due process of law.

1.—THE QUESTION OF JURISDICTION.

The jurisdiction of this court to inquire into the question thus raised is vindicated in the case of

> Quin Bohanan vs. State of Nebraska, 118 U. S. 231.

In that case immunity from a second trial for an offense of which the plaintiff in error insisted he had been acquitted was claimed by virtue of the 5th Amendment to the Constitution of the United States. The court said that having made the claim, and the ruling on it in the highest court of the state having been against him, the judgment was open to review here.

Whether one is protected by the 14th Amendment against being twice put in jeopardy for the same offense was considered by this court in

Dreyer vs. People of Illinois, 187 U. S. 71,

but was not decided. It was held in that case, on the authority of United States vs. Perez, 9 Wheat. 579, that the discharge of the jury on account of their inability to agree did not prevent a re-trial, nor operate as an acquittal, the record of the trial reciting that "the jury aforesaid being now returned into court and *being unable to agree upon a verdict,* are thereupon, by order of this court, discharged from further consideration of this cause."

The salient feature of this case is that no adjudication or record was made by the court that the jury was unable to agree, nor any that there was no reasonable probability that they would or could agree. The most the court could say was "that there is a reasonable probability that the jury cannot agree." Finding the condition contemplated in the statute, Section 2125, to exist, the jury was discharged and the right to put him on trial again is asserted by virtue of the provisions of Section 2126, as follows:

> "In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried."

It is believed that the essential difference between the record in this case and that under consideration in the Dreyer case will require of this court a determination of the question as to whether the right not to be twice put in jeopardy is protected by the 14th Amendment.

2.—IS THE RIGHT NOT TO BE TWICE PLACED IN JEOPARDY PROTECTED BY THE 14TH AMENDMENT?

The view that the rights enumerated in the first eight amendments to the constitution of the United States, before the adoption of the 14th Amendment uniformly held to be limitations on the federal and not state authority, are such privileges and immunities of citizens of the United States as are protected by that amendment against adverse action by the states is, of course, not contended for. It was ably set forth in opinions filed in the case of

O'Neill vs. Vermont, 144 U. S. 323,

but was rejected by this court in

Maxwell vs. Dow, 176 U. S. 581.

Touching that contention and the conclusion to be drawn from the consideration which the subject has received from this court, a late work says:

> "The argument has frequently been advanced that the rights protected by the first eight amendments are such privileges and immunities; but though the

view has had distinguished advocates, the court has held otherwise and has asserted the true criterion to be the fundamental character of the right for which protection is claimed, so that some of the rights enumerated in the early amendments may be privileges and immunities of citizenship while others are not."

McGhee on Due Process, 34.

Commenting on the same argument another writer says:

"It depends on the nature of the right not on the fact that it is mentioned in those amendments."

Brannon on the 14th Amendment, 72.

Repeatedly this court has said in relation to the language of the amendment appealed to:

"The clause, therefore, means that there can be no proceeding against life, liberty or property which may result in deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Hagar vs. Rec. Dist. 111 U. S. 701;
Hurtado vs. California, 110 U. S. 516;
Marchand vs. Penn. R. R., 153 U. S. 387.

The question in every case is as to whether the right is a fundamental one, one of "those general rules established in our system of jurisprudence for the security of private rights."

That in cases involving life or liberty at least there must be a "regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard." The right to appear and be

heard in judicial proceedings, to have notice, is conceded to be of such a fundamental character.

Likewise it has been held that "a statute which compels the litigant to submit his controversy to a tribunal of which his adversary is a member makes his antagonist his judge and does not afford due process of law."

Com. vs. Smith, 84 N. E. 376.

This case makes practical application of the maxim that no one should be judge in his own cause.

A case from the state of Ohio, and one from the state of Rhode Island afford further guides to the character of the fundamental rights that are secured from invasion by the amendment in question. The Ohio case,

Hammond vs. State, 84 N. E. 416,

considered a statute of that state intended to suppress trusts, which provided that "the character of the trust or combination alleged may be established by proof of its general reputation as such." The act was held invalid because it permitted a conviction on hearsay and in effect deprived the defendant of the presumption of innocence, the court saying:

> "This, we think, is not due process of law, but is violative of Section 1 of Article XIV of the Constitution of the United States."

The Rhode Island case,

State vs. Kartz, 13 R. I. 528,

presented the same question. It considered a law making it an offense to keep a place reputed to be a place where intoxicating liquors are sold. Such a law it was held was

"so repugnant to the fundamental rules of our jurisprudence" as to be "violative of Section 1 of Article 14 of the Constitution of the United States."

It has been twice at least held by the federal courts that the right not to be twice put in jeopardy for the same offense is of so fundamental a character as to be guarded by the 14th amendment.

In re Bennett, 84 Fed. 324;
Ex parte Ulrich, 42 Fed. 587.

The question came before the court in In re Bennett on a state of facts similar to those presented in Bohanan vs. Nebraska. The petitioner had been convicted of a lesser offense embraced within a graver charge upon which he had been tried. The conviction had been set aside upon appeal, and upon a new trial he was convicted of the higher grade of the crime of which he claimed he had been acquitted by the first verdict. This contention Judge De Haven held was correct,—the matter coming before him upon habeas corpus proceedings founded upon the claim that the proceeding was in derogation of the process of law clause of the 14th Amendment. The learned judge maintained that they were clearly so, but held that a review must be had by writ of error to this court and not by habeas corpus.

It might be said here that the same question was involved in this case, the plaintiff in error contending that the verdict rendered on the first trial convicting him of murder in the second degree was an acquittal of the charge

of murder in the first degree, which contention was sustained by the learned trial judge.

Instruction No. 53, Transcript, page 31.

The views of Judge De Haven on the question now under consideration were expressed in the following paragraph from the opinion in the Bennett case:

> "The right of a person, after acquittal by a jury, to be exempt from the jeopardy of being again placed on trial in the same court, and upon the same indictment, for the identical offense of which he has been acquitted is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to the citizen; and, unquestionably, the guaranty of due process of law, found in the fourteenth amendment to the constitution of the United States, was intended, among other things, to secure to the citizen this right, and deprives the state of authority to convict and punish a person for a crime of which he has been duly acquitted by a jury, when the fact of such former acquittal is made to appear to the court before which he is again put in jeopardy for the same offense. Ex parte Ulrich, 42 Fed. 587. See, also, Ex parte Lange, 18 Wall. 163.
>
> "The judgment of the court under which the petitioner is now imprisoned is in violation of the constitutional rights of the petitioner as thus defined, and, in my opinion, is void in the extreme sense. After the petitioner was acquitted of the higher offense charged in the information, the superior court of the county of Alameda had no jurisdiction to again place him upon trial for such offense, upon the same information, or to require him to enter any further plea in order to preserve his constitutional right of protection against a second trial for that offense; and, if there is any statute of the state which attempts to confer upon the courts of the state such a jurisdiction, it is, in so far as it attempts so to do, clearly repugnant to the provision of the fourteenth amendment to the constitution of the United States, before referred to, and therefore void."

In that case an appeal had been taken to the Supreme Court of California from the judgment of conviction on the second trial, where it was affirmed for the reason that no plea of former jeopardy had been interposed.

People vs. Bennett, 114 Cal. 56.

Judge De Haven, however, held that it appearing by the record that the petitioner had been acquitted of the higher grade of offense on the first trial, the court was bound to take judicial notice of the fact without any plea, and that the record showed the judgment to be void because rendered contrary to the petitioner's fundamental constitutional rights.

The case of Ex parte Ulrich is not only directly in point on the question now being considered, but is a direct authority upon another feature of the case in holding that an improper discharge of the jury before they shall have rendered a verdict, a discharge where no necessity for such action exists, operates as an acquittal of the defendant, and is as effectual to prevent a re-trial as would a verdict of "Not Guilty" be.

In that case Judge Phillips of the United States District Court for the Western District of Missouri, released on habeas corpus a prisoner who had been convicted upon a second trial, the jury impaneled on the first trial having been discharged without sufficient reason for such action, as the court held.

Whether such a proceeding was forbidden by the 14th Amendment was elaborately considered by the learned judge, who reached the conclusion that the right not to be

placed twice in jeopardy for the same offense is "imbedded i. the very bone-work of our political and judicial system;" he declared that

> "We will find no principle of the common law, grounded upon the great rock of the *Magna Charta*, more firmly rooted than that no man shall be twice vexed with prosecutions for the same offense;"

and added:

> "As expressive of how deeply rooted this principle of the common law has ever been in the minds and convictions of the American people, as their common, inestimable, heritage of liberty from the institutions and usages of the mother country, the colonists, long before the adoption of the constitution, incorporated the provision respecting due process of law, or the law of the land, in all their local governments; and there has not been a constitution, state or federal, adopted on this continent, which does not contain the provision against double trials and punishments, or punishments after acquittal."
>
> Ex parte Ulrich, 42 Fed. 590-591.

He quoted, to sustain the views expressed by him, the following language of Mr. Justice Miller, used in

> Ex parte Lange, 18 Wall. 163:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. * * * The principle finds expression in more than one form in the maxims of the common law. * * * In the criminal law the same principle, more directly applicable, * * * is expressed in the Latin, *'nemo bis punitur pro eodem delicto,'* or as Coke has it, *nemo debet bis puniri pro uno delicto.'* * * * The common law not only prohibited a second punishment for the same offense, but it went further, and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

The following from

Com. vs. Olds, 5 Litt. (Ky.) 137:

"Every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. * * * To prevent these mischiefs the ancient common law, as well as *Magna Charta* itself, provided that one acquittal or conviction should satisfy the law, or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our constitutions the clause in question."

And the following from

State vs. Cooper, 13 N. J. Law, 361:

"Our courts of justice have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. * * * And all who are conversant with courts of justice * * * must be satisfied that this great principle forms one of the strong bulwarks of liberty." He considered the case of

Hurtado vs. California, 110 U. S. 516,

in which this court held that it was within the power of the state to abolish the grand jury system and substitute prosecutions by information, which had been appealed to in opposition to the application for the writ, and showed that nothing therein said would lead to the belief that the right claimed by the petitioner to have been invaded was not of a fundamental character and so protected by the requirement of due process of law. The learned judge en-

tertained no doubt that it was, nor that the action of the court in discharging the jury before a verdict was returned —no necessity for such a course appearing—was in effect an acquittal.

Though it was afterwards held in this case by the Circuit Court of Appeals that the review must be by error and not by habeas corpus, the reasoning of the opinion on the merits has never been successfully assailed. In

Ex parte Nielson, 131 U. S. 176,

this court declared the right not to be twice put in jeopardy to be fundamental, saying, with reference to the petitioner in that case;

> "He was protected by a constitutional provision, securing to him a fundamental right."

The particular amendment referred to was undoubtedly the 5th, operative because the court before which the conviction in that case was had, being a territorial court, was subject to its provisions. But the court did not content itself with speaking of the shield of the constitution. It referred to the right which had been expressly guaranteed by the constitutional provision as "fundamental," an expression that has particular significance, not so much because it has been frequently used in discussions of the subject since the later decisions of this court, to characterize those rights which are not subject to destruction or impairment, by reason of the 14th Amendment, but because of the views expressed in the opinions filed in the Hurtado case. In the dissenting opinion of Mr. Justice Harlan it is said, "My brethren concede that there are principles of

liberty and justice, lying at the foundation of our civil and political institutions, which no state can violate consistently with that due process of law required by the 14th Amendment in proceedings invoking life, liberty and property."

This statement of the learned Justice of the views expressed by his brethren is fully justified by the following language from the opinion in

Brown vs. Comrs., 50 Miss. 468,

quoted by Mr. Justice Mathews, speaking for the court:

> "The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain *fundamental* rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by 'due process of law.'"

The thought embodied in this quotation was the governing idea in the decision in the Hurtado case. The "general maxims of liberty and justice" which came to us with the common law, it was declared, "must be held to guaranty not particular forms of procedure, but the very substance of individual rights, to life, liberty and property."

The question in that case being as to the validity of a change in the method of procedure and it being considered that by the method sanctioned by the new law, reasonable security for the preservation of the fundamental rights of the accused were provided, it was held that such procedure was "due process of law."

So in Maxwell vs. Dow, the question was as to the validity of a change in procedure, a state statute providing for trial by a jury of eight in criminal cases not capital being under investigation.

The right not to be placed twice in jeopardy for the same offense is essentially different in character from a claim demanding adherence to ancient and revered methods of procedure. It is rather of the "substance of original justice," which must be guarded and insured in any change in procedure which the wisdom of the passing years may suggest.

But the declaration of this court in the Nielsen case to the effect that the right is a *"fundamental"* one has added significance in view of the oft quoted language of Mr. Justice Washington,

Corfield vs. Coryell, Fed. Cas. 3230,

referred to in Maxwell vs. Dow, in which, speaking of the clause in Section 2 of Article IV of the Constitution of the United States, to the effect that "the citizens in each state shall be entitled to all the privileges and immunities of citizens of the several states," he said:

> "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. What these *fundamental* principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty with the right to acquire and possess

property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

Maxwell vs. Dow, 176 U. S. 588.

In the opinion of Lush, J. in

Wemyss vs. Hopkins, L. R. 10 Q. B. 378,

quoted in

Kepner vs. United States, 195 U. S. 127,

that learned jurist says:

"I am also of opinion that the second conviction should be quashed, upon the ground that it violated a *fundamental* principle of law, that no person shall be prosecuted twice for the same offense."

The right under consideration is said to be "a part of the universal law of reason, justice, and conscience."

17 Am. & Eng. Ency. of Law, 581.

"It is embodied in a maxim of the civil law and is embedded in the every elements of the common law."

Id.

Speaking of the incorporation in the English law of that maxim that no person should be put in jeopardy a second time for the same offense, Mr. Justice McLean said it "was so strongly recommended by the principles of justice that no intelligent people could resist it."

U. S. vs. Keen, 1 McLean, 429, Fed. Cas. No. 15,510.

"It is a principle founded in obvious justice."
Note to People vs. McDaniels, 92 Am. St. Rep. 93.

It can scarcely admit of doubt that it is one of those "general rules established in our system of jurisprudence

for the security of private rights," which no state can disregard or annul,—a right protected by the 14th amendment against infringement by any branch of a state government.

3.—EXTENT OF THE RIGHT.

If, then, the 14th Amendment forbids that one be twice put in jeopardy for the same offense, it becomes the duty of this court to determine and declare when and under what circumstances the right is invaded.

The Supreme Court of Montana holds in the judgment to be reviewed that nothing short of a *verdict* of *acquittal* or *conviction* will bar a second trial of a defendant, and it holds that the statute of Montana, Section 1356, permits a re-trial in every case in which the first trial did not result in a verdict of conviction or acquittal.

Transcript, page 102.

The statute in question reads as follows:

> "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."

So construing the statute, and this court must adopt the construction given it by the state court, it unquestionably offends against the 14th Amendment in permitting a re-trial of a defendant in a case where on the first trial the jury was improperly discharged by the court.

The learned Chief Justice of the Supreme Court of Montana declined to subscribe to this view of the law expressed by the majority of the court.

Transcript, pages 104, 118.

The overwhelming weight of authority is against the view expressed in the opinion of the Supreme Court of Montana, and no case is cited in support of the position it takes. If it has correctly construed the statute, the court should have held it void. The law as all but universally held is expressed in the following:

> "Jeopardy begins when the jury is impaneled and sworn for the trial of a valid indictment in a court of competent jurisdiction, and if the trial be thereafter terminated without verdict by the discharge of the jury in an improper manner, or otherwise than for a manifest necessity, accused cannot be again put on trial for the same offense. Failing to object to illegal discharge of jury does not prevent accused from availing himself of the jeopardy."
>
> 7 Current Law, 1013.

This question was involved in

> Ex parte Ulrich, 42 Fed. 587,

in which case it will be remembered the jury was discharged without a verdict. The opinion refers to many cases in which the rule as above expressed is laid down.

The elementary works lay down the rule in substantially the same terms.

> Cooley on Const. Lim. 399 (6th Ed.);
> 1 Bishop on Crim. Law, 1016 (5th Ed.);
> 1 Bishop's Crim. Proc. 821;
> 12 Cyc. 269-270.

The work last cited thus states the rule:

> "If the jury are discharged for a reason legally insufficient and without absolute necessity for it, *the discharge is equivalent to an acquittal,* and may be pleaded as a bar to a subsequent indictment."

The text is supported by reference to decisions from nearly half the states of the Union. An elaborate note to the case of

State vs. McKee, 21 Am. Dec. 499,

refers to many cases holding similarly. No effort will be made to collate all the cases.

A multitude of them will be found in

Note 8 to 17 Am. & Eng. Ency. of Law, 1261,

in support of the following text:

> "It is generally agreed that the discharge of the jury in a criminal case, in the absence of circumstances rendering it proper for the court to exercise a discretion in that behalf, will operate as an acquittal of the defendant."

Another long list is appended to enforce the view expressed by the Supreme Court of California in

People vs. Webb, 38 Cal. 467-468,

the opinion in which is commended by this court in Kepner v. U.S., 195 U.S. 100-131, ~~more~~ ; People vs. Hunckeler, 48 Cal. 331-334.

Indeed the position taken by the Supreme Court of Montana that the plea of former jeopardy is available only after a verdict and not in any case when the jury is discharged during the trial, was declared by this court in

Kepner vs. United States, 195 U. S. 100-128,

to be against the weight of authority. The following is the language of Mr. Justice Day, speaking for the court:

> "It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged

with a crime before a tribunal properly organized and competent to try him; certainly so after acquittal. Coleman v. Tennessee, 97 U. S. 509, 24 L. ed. 1118."

The view taken by the Supreme Court of Montana that a defendant has been but once in jeopardy, however often he may have been tried for the same offense, had found expression in the dissenting opinion of Mr. Justice Holmes in the case last above referred to.

It would seem that the very fact that the learned justice specified particular cases in which the defendant might be tried a second time, would lead quite reasonably to the conclusion that in certain cases the discharge of the jury without their having rendered a verdict would preclude trying him again. It might be observed that no cases were included in the category in which the prosecution was dismissed, after the taking of evidence began, on motion of the state, or where for his own convenience the judge dismissed the jury and continued the cause, or where he discharged the jury under any circumstances, not regarded in the law as justifying such a course. The cases compiled illustrate conditions in which the rule is inapplicable rather than militate against the rule that a wrongful—that is an unwarranted—discharge of the jury amounts to an acquittal and is as effective to support a plea of former jeopardy as is a verdict of not guilty.

State vs. Nelson, 61 Am. St. Rep., 780.

Where the defendant expressly consents to the discharge of the jury, or asks that the verdict be set aside and a new trial granted, he is, of course, estopped to plead former jeopardy.

Some very recent decisions in conformity with the opinion of the majority of the court, as counsel for the plaintiff in error understands it, are the following:

Bagwell vs. State, 58 S. E. 650;
State vs. Richardson, 35 L. R. A. 238.

4.—WAS THE JURY PROPERLY DISCHARGED?

If, then, the discharge of the jury for a reason legally insufficient precludes his being put upon trial again, it will be necessary to inquire as to the sufficiency of the reason for the discharge of the jury in this case.

Upon the second trial of the defendant, the jury was discharged and an entry made as follows:

> "In this cause the jury returned this day into open court, the defendant being present in person, and by counsel; whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury can not agree, court ordered the jury discharged from further consideration of this cause. * * *"

Transcript, pages 83-84.

It will be observed that this entry follows the language of Section 2125 of the Penal Code of Montana in its recital of the condition in view of which the jury was excused. The plaintiff in error presents that the condition recited in the order is not such as warranted the discharge of the jury, notwithstanding the language of the statute, and that a re-trial of the plaintiff in error, after the discharge of the jury, under the circumstances recited in the order, is an invasion of the right guaranteed to him by Section 18, Article III of the constitution of the State of Montana, not to be twice put in jeopardy for the same offense; and that a

re-trial of the plaintiff in error under the circumstances operates to deprive him of his liberty, contrary to the provisions of Section 27, Article III of the constitution of the State of Montana, and of Section 1 of the 14th Amendment to the constitution of the United States.

The statute above referred to is an innovation in the criminal law of this country. Chapter III, Title VII, of Part II of the Penal Code of Montana, being Sections 2120 to 2127 inclusive, is taken, as is the entire code of criminal procedure of the State of Montana, speaking generally, from the Penal Code of the State of California, the sections last referred to being identical with Sections 1135 to 1142 of the California Penal Code, except that the language "it satisfactorily appears that there is reasonable probability that the jury cannot agree," found in our Section 2125, is as follows in their Section 1140: "it satisfactorily appears that there is no reasonable probability that the jury can agree."

It scarcely requires argument to convince even a casual reader that there is a wide and substantial difference between these two statutes. Indeed, they express ideas that are at opposite poles in the realm of probabilities as to a disagreement. A reasonable probability that the jury cannot agree implies simply a preponderance in favor of that conclusion. It implies equally that there still remain chances that the jury will eventually be able to agree, though the chances are against it. It does not exclude the idea of a reasonable hope of agreement. On the contrary when it can be said that "there is no reasonable probability that

the jury can agree" every reasonable probability of an agreement is gone, every reasonable hope has vanished. The difference between the two expressions may be, perhaps, made clear to any to whom it might seem obscure, by taking the case of two men who are ill. The attending physician answers an anxious inquirer with respect to "A" that there is a reasonable probability that he cannot get well. With respect to "B" he says there is no reasonable probability that he can get well. It is evident that he still hopes for the recovery of A; that he has by no means given up, that he feels, probably, that the chances are against him, and that he runs some risk, perhaps even a great deal of risk, of dying, but that by good fortune and careful attention he may survive. His language with reference to B indicates that all hope is gone. His recovery would be a miracle not looked for, and not to be expected.

It might be illustrated further by reference to the rule of proof in a criminal case. If a trial court should instruct a jury to the effect that they should find a verdict against the defendant if they believed that there is a reasonable probability of his guilt, the judgment would have to be reversed. It is only where there is no reasonable probability of his innocence that a verdict of guilty is justified. A reasonable probability of the man's guilt of the crime is a vastly different thing from there being no reasonable probability of his innocence.

Or, perhaps the very best method of illustrating the important difference between the two expressions is by as-

suming the case of the jury returning into court and being interrogated as to the probability of their reaching a verdict. If the foreman, on being interrogated by the court, should say "there is a reasonable probability that we shall not be able to agree," the court would immediately be prompted to answer, "Well, it is quite apparent that all hope of your agreement is not gone. You evidently believe that there is still some chance of your being able to agree, upon further consideration." On the contrary, if he answered, "There is no reasonable probability that we shall ever be able to agree" further debate would simply be useless. The very language of the first answer supposed carries with it a suggestion that upon further consideration an understanding might be arrived at. The latter answer clearly indicates the hopelessness of further discussion.

Of course, the order must be taken as it stands. It must be deemed that the court, after having made careful inquiry, was able to reach simply the conclusion that there was a probability that the jury could not agree. He was not able to satisfy himself, it must be assumed, that every reasonable hope, every fair expectancy of an agreement was gone, but simply that the chances were rather against their agreeing, if they should be sent out again.

No effort is made to impeach the record made at the time. No claim is made that upon further inquiry it would have been revealed that an agreement was imminent. The plaintiff in error stands upon the record as it was

made. He insists that it does not disclose a condition warranting the jury's discharge.

The record presents the question as to whether a discharge of the jury, under such circumstances, will warrant a re-trial, and that raises for consideration the question as to the circumstances and conditions under which a jury may be discharged for failure to agree, without such discharge operating as an acquittal.

When the meaning and effect of the constitutional provisions providing that no person should twice be put in jeopardy for the same offense first came before the courts of this country for consideration, it was held in quite a few instances that if a jury disagreed, the defendant was entitled to his discharge, because to put him on trial a second time, under such circumstances, would be violative of the constitutional guaranty. Decisions to this effect were made in Pennsylvania, Virginia and the Carolinas. Later decisions in these states repudiated this rule, and they now conform, practically, to the decisions in the states generally, holding that the inability of the jury to agree, is such a necessity as warrants the discharge of the jury and permits the re-trial of the defendant.

12 Cyc. 273, Par. 14;
11 Am. & Eng. Ency. of Law, 1st Ed. 953;
17 Am. & Eng. Ency. of Law, 2nd Ed., 1254-1255.

The rule now generally accepted is that a re-trial may be had "if by any overruling necessity the jury are discharged without a verdict."

4 Am. & Eng. Ency. of Law, 1st Ed. 797.

Such overruling necessity exists if the term comes to an end before the trial is finished, or if the judge or some member of the jury should die or become so seriously ill as to be unable to proceed with the cause. So, also, the defendant is held not to have been in jeopardy "if the jury is discharged after considering the cause for such a length of time as to leave no reasonable expectation that they will be able to agree upon a verdict." Necessity is the only justification for the discharge of the jury, and the authorities hold that where "there is no reasonable expectation that they will be able to agree, such a condition of affairs constitutes absolute and urgent necessity, and justifies the court in discharging the jury."

12 Cyc. 273.

With a view to express the extremity which must be arrived at before the court will be warranted in discharging a jury, the courts have not contented themselves with saying even that a necessity must arise, but they have used qualifying terms intended to indicate that such a condition must exist as renders that course the only one practicable at all. Thus in

Ex parte Glenn, 111 Fed. 257-261,

it is said that a discharge except under an "*imperious* necessity will operate as an acquittal." The same qualifying adjective to describe the character of the necessity which will warrant such action is used in the opinion in

McCorkle vs. State, 14 Ind. 39.

In

State vs. Allen, 54 Pac. 1060,

it is said that an *"absolute* necessity" must exist. An *"overruling* necessity" is the way it is expressed in

Helm vs. State, 6 So. 322, and in
Ex parte Maxwell, 11 Nev. 435.

In

State vs. Callendine, 8 Ind. 288,

the necessity for the discharge of the jury must be, it is said, *"peremptory* and *controlling."*

The result of a discharge, except under circumstances such as are indicated above, is expressed in the following extract from the opinion in

Ex parte Glenn, *supra.*

> "I reach the conclusion that if the court discharges a jury in a capital or felony case without the consent of the prisoner, and without imperious necessity, such action entitles the prisoner to a final discharge from further trial or prosecution. See 1 Bish. Cr. Proc. Par. 821; 2 Am. Cr. Law, Par. 576; Com. v. Cook, 9 Am. Dec. 472; State v. McKee, 21 Am. Dec. 506, note; Mahala v. State, 31 Am. Dec. 591; in re Ah Jow (C. C.) 29 Fed. 182; Com. v. Andrews, 3 Mass. 126; Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868."

It is generally held also that to warrant a second trial of the defendant, after a discharge of the jury, the record must show the necessity for the prior discharge.

1 Bishop's Crim. Law, 837;
17 Am. & Eng. Ency. of Law, 1255 (2d Ed.);
People vs. Gage, 48 Cal. 326-327;
State vs. Schuchardt, 25 N. W. 722;
Upchurch vs. State, 44 L. R. A. 694-699;
State vs. Nelson, 61 Am. St. Rep. 780, 19 R. I. 467.

In the opinion in the case of State vs. Schuchardt, the Supreme Court of Nebraska quotes the following from the

opinion in

Dobbins vs. State, 14 Ohio St. 499.

"Counsel for the plaintiff very justly and necessarily concede that a case of necessity may exist which would legally justify the course taken in this instance, but they insist that such a case can only arise when some intervening impediment has necessarily stopped the progress of the first trial before verdict; that the power of discharging a jury in a criminal, and, especially in a capital case, is a delicate and highly responsible trust, to be exercised on account of the disagreement of the jury only when they have deliberated so long as to preclude all reasonable expectation that they will ever agree upon a verdict without being compelled to do so from famine or exhaustion; that this power does not rest upon the arbitrary or uncontrolable discretion of the judge presiding at the trial, but is a legal discretion, to be exercised in conformity with known and established rules; and, finally, *that unless the facts stated in the record clearly established a case of necessity, the discharge will operate as an acquittal of the accused, and preclude his further prosecution.*" And then adds:

"Abating something from the claim made as to what must of necessity affirmatively appear in the record, we have no hesitation in yielding to these propositions our entire assent; and they are certainly very strongly supported by the cases cited in argument. Hurley's Case, 6 Ohio, 402; Mount v. State, 14 Ohio, 304; Poage v. State, 3 Ohio St. 238; McKee's Case, 1 Bailey, 651; U. S. v. Perez, 9 Wheat. 580; People v. Goodwin, 18 Johns. 187; People v. Olcott, 2 Johns. Cas. 301; U. S. v. Coolridge, 2 Gall. 364; People v. Barrett, 2 Caines, 304.

"*Where the jury are discharged for any of the causes stated in section 475 of the Criminal Code, the record must show the necessity which required their discharge; otherwise the defendant will be entitled to an acquittal.* Hines v. State, 24 Ohio St. 134; Poage v. State, 3 Ohio St. 229; Hurley v. State, 6 Ohio, 400; Mount v. State, 14 Ohio, 295. This was not done in this case."

In Upchurch vs. State, the following from Wright vs. State, 35 Tex. Crim. Rep. 158, is quoted with approval:

> "The record informs us simply that the court discharged the jury. We are left to inference as to the reasons prompting him to this action. There should have been a judgment of the court finding and declaring that the jury had been kept together such a length of time *as to render it altogether improbable that they could agree.*"

In

Ex parte Maxwell, 11 Nev. 428-437,

the record stated that the jury "retired in charge of the sheriff, duly sworn, and subsequently returned into court, and, by their foreman, stated that they were unable to agree upon a verdict, whereupon the court discharged the jury from further consideration of the case." The court held that this record did not warrant a subsequent trial of the defendant, commenting upon it as follows:

> "Now for what reason were the jury thus discharged? The record is silent as to the length of time the jury were out, but it is clear that there was no necessity for their discharge in consequence of its having been so near the end of the term (as limited by the statute), as to preclude further deliberation on the part of the jury, because the ensuing term did not commence until the first Monday (3d) of April. Was it, then, because the court was satisfied that the jury had deliberated a sufficient and proper length of time, and there was no reasonable probability of their being able to agree upon a further deliberation? The record does not so state; nor does it appear that the court so adjudged. The only ground appearing was that the foreman of the jury stated that 'they were unable to agree upon a verdict.' This was clearly insufficient, and was no ground for the exercise of that 'delicate and highly important trust that only exists in cases of extreme and absolute necessity.' The court may have been satisfied that the jury were unable to

agree upon a verdict, and that there was no reasonable probability of their doing so upon further consultation and deliberation. But these were essential facts, the existence of which ought to be determined by the court and established by the record. And as the record fails to establish the existence of such facts and such determination, it follows that the discharge of the jury was an illegal exercise of power on the part of the court.

"We are, therefore, of opinion that the prisoner has been once put in jeopardy within the meaning of the constitutional provision under consideration, and that the discharge of the jury, under the circumstances disclosed by the reocrd, was equivalent to a verdict of acquittal."

In

State vs. Allen, 54 Pac. 1060,

the entry was as follows:

"The jury not having agreed upon a verdict in the above entitled cause, the jury is discharged from further consideration of this case."

The failure to record the facts showing the necessity for the discharge was held to operate as an acquittal of the defendant. In the opinion in

State vs. Klauer, 78 Pac. 802,

it is said to have been held in

State vs. Smith, 24 Pac. 84,

"that the record ought to show affirmatively the existence of the facts which induced the court to exercise the extraordinary power of discharging the jury, in order that the constitutional rights of the accused may be preserved."

In the case of State vs. Allen, above referred to, the court, after reviewing the authorities, said:

"It results from these cases that before a court may discharge a jury to which has been submitted the question of the guilt or innocence of the accused, and

especially in capital cases, there must exist—First, an absolute necessity for such discharge; second, the court must make inquiry, and find and determine that such necessity existed at the time of the discharge; and, third, the essential facts as to such necessity, and the finding of the court thereon, must be made a matter of record, or the defendant may successfully plead former jeopardy when placed on trial on the same charge. Dobbins v. State, 14 Ohio St. 493; Hines v. State, 24 Ohio St. 134; Ex parte Maxwell, 11 Nev. 436; State v. Reinhart, 26 Or. 466, 38 Pac. 822; People v. Smalling, 94 Cal. 112, 29 Pac. 421; Conklin v. State, 25 Neb. 784, 41 N. W. 788; State v. Leunig, 42 Ind. 541; State v. Jefferson, 66 N. C. 309; State v. Pool, 4 Lea. 363."

In State vs. Nelson, *supra*, the court said:

"The defendant had the right to a judicial finding upon the question of the necessity for dismissing the first jury, and, in the absence of it, to a discharge."

The necessity for a record showing an adjudication of the necessity for the discharge is thus expressed in 17 Am. & Eng. Ency. of Law, 593:

"Though in general jeopardy begins when the jury has been impaneled and sworn, yet, if afterwards and before a verdict has been reached, some unforseen circumstance arises which renders it impossible for the trial to proceed to a verdict or for a valid verdict to be rendered, the jury may be discharged, *the facts of the case having been adjudged and the judgment recorded*, and the defendant may be again put on trial for the same offense."

By Bishop, in the following language:

"The better view of this whole question may be stated as follows: Whenever, after a trial has commenced, whether for misdemeanor or for felony, the judge discovers any imperfection which will render a verdict against the defendant either void, or voidable by him, he may stop the trial, and what has been done will be no impediment in the way of any future

proceedings. Whenever, also, anything appears showing plainly that a verdict cannot be reached within the time assigned by law for the holding of the court, he may adjudge this fact to exist; and, on making the adjudication matter of record, stop the trial, with the like result as before. *But, without the adjudication, the stopping of the trial operates to discharge the prisoner.* In other words, when the record shows the defendant to have been in actual jeopardy, he is protected thereby from further peril for the same alleged offense. But when it shows also, in addition to this, something which disproves the peril, it does not show the peril, whatever else it shows, and therefore it does not protect him."

1 Bishop's Crim. Law, (5th Ed.) Sec. 1036.

The rules laid down in the authorities to which we have adverted are not such as depend in any manner whatever upon statutory provisions. They are principles which have been worked out by the courts, as following from the constitutional right of a defendant not to be twice put in jeopardy for the same offense. In recognition of the principles so announced and the construction of the constitutional provision referred to, by the courts, statutes have been passed in many states declaratory of the law authorizing the discharge of a jury for failure to agree. With scarcely an exception they embody the idea expressed in the California statute that there is no warrant for the discharge of the jury until there is no longer any reasonable probability that the jury can agree, that all reasonable hope and expectancy of a verdict have vanished.

The language of the California statutes is that most commonly observed. It is found in the Idaho statute, Penal Code of Idaho, sec. 5488; in the North Dakota stat-

ute, Revised Code of 1899 (Code Crim. Proc. sec. 386); South Dakota, Code Crim. Proc. sec. 394, (Rev. Codes, 1903); in that of Arizona, Revised Statutes of 1901, Penal Code, sec. 963; and Nevada, Compiled Statutes of Nevada, 1900, secs, 4361-4362. The Indiana statute is as follows:

> "The jury may be discharged by the court, on account of the sickness of a juror, or other accident or calamity requiring the discharge, or by consent of both parties, or until after they have been kept together until it satisfactorily appears that there is no probability of their agreeing."
>
> Burns Anno. Ind. Stat. (1894) Sec. 551.

The Ohio statute is identical with that of Indiana.

> Bates' Anno. Ohio Stat., Sec. 5195 (4th Ed.)

Wyoming appears to have copied the language of the statutes of the two states last named.

> Revised Statutes of Wyoming, 1899, Sec. 3649.

The Nebraska statute has the same origin, apparently, and follows the same language.

> Compiled Statutes of Nebraska, Sec. 1272.

The same is the case with that of Kansas. See statute quoted in

> State vs. Smith, 24 Pac. 84.

Washington has the same statute.

> Ballinger's Anno. Codes and Stat. of Washington, Sec. 5006.

The Oregon statute is likewise substantially identical, being as follows:

> "Except as provided in sections 138 and 148, or in case of some accident or calamity requiring their

discharge, the jury shall not be discharged after the cause is submitted to them until they have agreed upon a verdict and given it in open court, or unless by the consent of both parties entered in the journal, or unless at the expiration of such period as the court may deem proper it satisfactorily appears that there is no probability of an agreement."

Ballinger & Cotton's Anno. Codes & Stat. of Oregon, Sec. 145.

So likewise is the Iowa law.

Code of Iowa, Sec. 3714. (1897.)

The Arkansas statute provides that the jury must be kept out until "it satisfactorily appears that there is no probability that they can agree."

Digest of Stat. of Arkansas, 1894, Sec. 2242.

The Texas statute reads:

"The jury may be discharged after the cause is submitted to them when they cannot agree, and both parties consent to their discharge, or where they have been kept together for such time as to render it altogether improbable they can agree; in the latter case the court, in its discretion, may discharge them."

Penal Code, 1897, Art. 739.

It might be noted as an exceedingly significant fact that every western state, whose codes of procedure are founded upon those of the State of California, except Montana, namely, Nevada, Idaho, North Dakota, South Dakota, as well as the territory of Arizona, has followed, with reference to the subject under consideration, the very language of the California law. Why it was that in framing the Montana code of criminal procedure, the legislature felt called upon, while following the language of the Penal

Code of California quite generally, to deviate from it at this point, there seems to be no foundation even for a guess. No similar statute has been discovered, after an exhaustive research, in any legislation in any of the states upon this subject. A consideration of them as a whole reveals how universally is entertained the idea that a second trial of a defendant is not justified unless on the former trial the jury were unable to reach a verdict, and every reasonable expectancy that they would do so was gone.

No direct adjudication upon the question now presented to the court has been found among the decided cases, for the very plain reason that no state has ever attempted to pass a statute, apparently, of similar import; and for the reason, probably, that it was recognized that such a statute would be alike against public policy and contrary to the constitutional rights of the defendant in a criminal case; or, rather, that a discharge under such circumstances would prevent the re-trial of the defendant.

It must be concluded, upon reflection, that it would be unwise, as well as unfair to a defendant to place in the hands of the court the power to discharge a jury whenever he thought there was a probability that they were going to disagree.

In this case it will be observed by the record that the court did not find that the jury could not agree, and did not find even that there was no reasonable probability that they could agree. He simply believed that there was a probability that a disagreement would be the result of their deliberations. The force of this finding is in no way

altered or changed by the use of the word "reasonable." The California statute would doubtless be construed as meaning exactly the same if the word "reasonable" were omitted from it, and it read, "until it satisfactorily appears that there is no probability that the jury can agree." Undoubtedly the court would hold that that meant no reasonable probability, if, indeed, there can be deemed to be any difference whatever between a reasonable and an unreasonable probability, or if there can exist such a thing as an unreasonable probability.

It must be conceded that Section 1128 of the Penal Code authorizes the court, after a jury has been out five minutes, to call them in and discharge them if he believes there is a probability that the jury cannot agree; and this he might do in the honest and conscientious discharge of his duty.

In nine cases out of ten, stoutly contested, some reasonable man might very justly entertain the opinion that the jury would disagree, and though others who with him heard the evidence might disagree with him as to such a result, probably few or any of them would be prepared to assert that such an outcome was not a reasonable probability.

It must be acknowledged by all that this statute vests in the court a power to discharge the jury under circumstances never heretofore accorded by any statute, and when the occasion for the establishment in the English law of the principle embodied in the constitutional guaranty is taken into consideration, it will appear at once that it

was intended to take away from the court the power to discharge, under the circumstances mentioned in the statute, or at least to make a discharge, under the circumstances, operate as an acquittal of the defendant.

The principle had its origin in the English law, like so many of the liberties we prize, out of the attempts of the Crown to prosecute and punish for alleged offenses of a political nature. Under the English system, where the judge held by appointment from the Crown, it was not at all unheard of in the days of more or less arbitrary power in the sovereign, for judges, at a hint from the government representatives, to discharge, on some trivial pretext, a jury which the Crown representatives thought would be likely to acquit the defendant, and hold him to answer before another jury which might be more tractable or obsequious; or, if the defendant happened to be a favorite of the Crown, to let the jury go, in the hope that he might stand a better show of acquittal when again brought to the bar.

Upchurch vs. State, 44 L. R. A. 694-699.

It was out of abuses of this character that the principle developed.

It is not uncommonly, perhaps it might be said that it is usually, the case, that the judge and the prosecuting officer belong to the same political party, and it might well be apprehended that for that or other reasons, judges might, at times, be disposed to abet the unwarranted zeal of the prosecuting officer. It is no answer to say that such conditions are not at all likely to arise; that it must

be presumed that judges and prosecuting officers will do their duty and will deal justly and fairly with those whom they are called upon to prosecute or try. Undoubtedly it must be so presumed. The presumption is a very strong one, and it must be said to the credit of the officers of the law, and the judges of our criminal courts, that it is rare indeed that the presumption is not realized in fact; but it is equally undeniable that instances do occur where judges become prosecutors, and forget the duty they owe to defendants on trial before them, or even regard their judicial duty as demanding action in violation of the law and of the constitutional rights of the defendant. It is because these rare instances do actually occur that constitutional guaranties are needed at all. Many constitutional guaranties would be entirely needless if judges always did what is right, equitable and just.

The plaintiff in error in this case, we maintain, had a clear constitutional right to have the jury who heard the evidence against him at the trial presided over by Judge Clements continue in its deliberations on the same, and in the effort to arrive at a verdict thereunder, not only until there was a probability that they could not agree, or a reasonable probability that they could not agree, or even, for the matter of that, a *strong* probability that they could not agree, but until every hope or expectancy of their arriving at a verdict was gone; in short, until there was no longer any reasonable probability that they would agree.

Having then, in effect, been acquitted of the crime charged, by the discharge of the jury by Judge Clements,

the further proceedings against him were in contravention of the 14th Amendment to the Constitution of the United States.

The replication to the plea of former jeopardy asserts that no objection was made by the plaintiff in error to the discharge of the jury on the second trial. But this mere silence, particularly when he was not asked as to whether he had any objection, is not to be deemed a waiver on his part of a fundamental right. The point has been frequently ruled on.

Ex parte Glenn, 111 Fed. 257-258;
State vs. Richardson, 35 L. R. A. 238;
12 Cyc. 271-272;
Allen vs. State, 41 So. 593;
People vs. Arnett, 129 Cal. 306, 61 Pac. 930;
Bagwell vs. State, 129 Ga. 170, 58 S. E. 650;
Jones vs. State, 97 Ala. 77, 12 So. 274;
Ex parte Maxwell, 11 Nev. 428;
Com. vs. Fitzpatrick, 121 Pa. St. 109;
Williams vs. Com., 44 Am. Dec. 403;
Ingram vs. State, 124 Ga. 448, 52 S. E. 759.

It should be ordered, accordingly, that the judgment of the Supreme Court of Montana be reversed, and that the plaintiff in error be discharged.

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Office Supreme Court, U. S.
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No. 113.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

JAMES S. KEEBL,

Plaintiff in Error,

vs.

THE STATE OF MONTANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

BRIEF OF THE STATE OF MONTANA.

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BRIEF OF THE STATE OF MONTANA.

We understand that the only question involved in this case, if this court determines that a Federal question is involved, is:

Was Plaintiff in Error twice placed in jeopardy of life or limb for the offense of Murder, or Manslaughter, by reason of his last trial and which resulted in his conviction of Manslaughter.

The original information in this case was filed in Lewis and Clark County on April 24th, 1902, charging Plaintiff in Error with the crime of Murder. (Tr. 34.)

Thereafter at a trial had in the district court of said county before the Honorable Henry C. Smith, Judge thereof, Plaintiff in Error was on June 3rd, 1903, convicted of Murder in the Second Degree. (Tr. 76).

Thereafter Plaintiff in Error appealed to the Supreme Court of the State of Montana from the "judgment finding him guilty of Murder in the Second Degree." The Supreme Court reversed the judgment and remanded the cause for a new trial on the ground, among others, that the information did not state a cause of action.

State vs. Keerl, 29 Mont. 508; 85 Pac. Rep. 862.

The case on being remanded to the district court came up for trial June 23, 1904, before the Honorable J. M. Clements, one of the judges thereof who on June 25th, 1904, denied the application of the State to amend the original information. (Tr. 78.) At this trial the jury failed to agree and were discharged on July 14th, 1904. (Tr. 83).

The case came up for trial before the Hon. Henry C. Smith, one of the Judges of said district court who on July 21st, 1904, permitted the information to be amended. (Tr. 1.) The case was then on the application of the plaintiff in error transferred for trial to the 8th Judicial District of said State before the Hon. J. B. Leslie, Judge thereof, before whom a third trial was had, resulting on June 23rd, 1905, in a conviction of Manslaughter. (Tr. 18.)

From this judgment of conviction an appeal was on June 27th, 1905, taken to the Supreme Court of the State of Montana by Plaintiff in Error (Tr. 98) and the judgment there affirmed. (Tr. 100-115).

The foregoing statement is practically the brief and argument on behalf of the State of Montana. The information was not amended until after the second trial. It cannot be contended that the first trial of the plaintiff in error operates as a bar to the subsequent trial or that it constitutes a jeopardy, for an appeal from that judgment was taken by plaintiff in error and the judgment reversed at his instance.

Trono vs. U. S., 199 U. S. 521.

And the second trial of plaintiff in error where it was claimed he was put in separate jeopardy was had on the original information, which was so defective that it would not support any judgment of conviction for either murder or any degree thereof, including Manslaughter. The Supreme Court of Montana in passing upon the sufficiency of this original information said:

> "The second point urged presents more difficulty. After alleging the infliction of certain mortal wounds, the information continues, 'of which said mortal wounds the said Thomas Crystal did then and there languish, and languishing did live, and thereafter, on the 21st day of April, A. D. 1902, at the County of Lewis and Clark, in the State of Montana, the said Thomas Crystal died.'
>
> An information must be direct and certain as regards the party charged, the offense charged, and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. (Penal Code, Sec. 1834.)
>
> It is not permissible to convict the defendant upon mere inferences; he must be directly, plainly and specifically charged with the commission of a certain crime, and it must be proved substantially as alleged in order to convict him. In order to convict an accused of murder, the fact of the killing by him as

alleged must be proved beyond a reasonable doubt. (Penal Code, Sec. 358.) The fact that the defendant inflicted upon another human being a mortal wound deliberately, premeditatedly, with malice aforethought, and with the intent to kill the victim is not sufficient to substantiate the charge of murder. The victim must die of the mortal wound, and within a year and a day after the stroke is received or the cause of death administered (Penal Code, Sec. 357). If the victim die of the mortal wound, but after a year and a day have elapsed since its infliction, the defendant may not be convicted of either murder or manslaughter. Neither can he be so convicted if, while the victim is languishing because of the mortal wound, death ensues from some cause not connected with or a consequence of the wound. For these reasons the information should directly allege that death resulted from the mortal wounds inflicted by the defendant. This view being so clearly correct in principle, it would seem that no citation of authorities is necessary, but see Clark on Criminal Procedure, 178; People vs. Lloyd, 9 Cal. 55; Commonwealth vs. Macloon, 101 Mass. 1, 100 Am. Dec. 89; State vs. Sundheimer, 93 Mo. 311, 6 S. W. 52; Maxwell's Criminal Procedure, 180; Bishop's New Criminal Procedure, Secs. 527, 531, 532; Wharton's Criminal Law (10th Ed.) Sec. 536.

In Lutz vs. Commonwealth, 29 Pa. 441, while an indictment containing language similar to the one at bar was sustained the court say: 'This indictment is not artistically expressed. Its grammatical construction is open to criticism, and it trenches hard on those rules of certainty which obtain in criminal pleading.'

The attorney general relies on the concluding clause of the information as supplying the defect, because it alleges 'and so the said James S. Keerl did in the manner and form aforesaid wilfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought kill and murder the said Thomas Crystal.' These words are the mere conclusion drawn from the preceding averments. If the averments are bad, the conclusion will not aid them; if they are good, and sufficiently describe the crime as the law requires * * * the formal concluding words are immater-

ial. (Ter. vs. Young, 5 Mont. 244; 5 Pac. 248; State vs. Northup, 13 Mont. 522; 35 Pac. 228).

We cannot give our approval to this information. As this case must go back for a new trial, the information may be amended by leave of the court to conform to the views herein expressed."

State vs. Keerl, 29 Mont. 511.

This decision of the Montana court as to the insufficiency of this information is well sustained by the authorities therein cited. The State of Montana maintains that an indictment or information too defective to support a judgment will not support a jeopardy.

"When the indictment is in form so defective that, supposing the defendant to be found guilty by the jury, he will still be entitled to have any judgment which may be entered of record against him reversed, he is not in jeopardy, and, if acquitted, is liable to be tried on a new and valid indictment. The author, in support of this proposition, cites many precedents, extending from Hale's Pleas of the Crown to the most recent declarations of courts upon this subject. State vs. Gill, 33 Ark. 129, 1 Crim. Law Mag. 665; Hosier vs. State, Id. 124. When a defendant has been convicted an appeal taken, and a new trial awarded, the case dismissed, and a second bill of indictment found, a plea of former jeopardy will not avail. Simco v. State, (Tex. App.) 2 Crim. Law Mag. 26 et seq. This is true when the judgment is arrested for apparent defects. State v. Sherburne, 58 N. H. 535; Smith vs. Com., (Pa.) 5 Crim. Law Mag. 615. The Supreme Court of Mississippi, in the case of Kohlheimer v. State, 39 Miss. 548, 77 Amer. Dec. 689, an exceedingly well reasoned case, announces this conclusion: 'It seems to be clear, therefore, upon principle as well as authority, that neither at common law, nor by our constitution will an acquittal or conviction, when the penalty has not been inflicted, upon a void proceeding or indictment, operate as a bar to a subsequent indictment for the same offense.'"

United States v. Jones, 31 Fed. 728.

The Kohlheimer case above quoted, contains a very exhaustive discussion of the principles here contended for and cites a great many cases both English and American in support thereof.

In United States vs. Shoemaker, 2 McLean's Reps. (U. S.) 114, in construing a case similar to the one at bar, the court seemed to take it for granted that a valid indictment was necessary to sustain a jeopardy and decided the case upon that theory.

> "Jeopardy attaches where a party is once placed upon trial before a competent court and jury upon a valid indictment to which he cannot be again subjected unless the jury be discharged from rendering a verdict by a legal necessity, or by his consent, or in case a verdict is rendered it be set aside at his instance. (People vs. Webb, 38 Cal. 467; and many subsequent cases cited). The information here was not a valid information and there was no jeopardy."

People vs. Ammerman, 118 Cal. 26.

> "There must have been a sufficient accusation on a former prosecution, otherwise the court could have no jurisdiction. If, therefore, the indictment was insufficient * * * because it was so defective in form or substance that a conviction upon it could not have been sustained, an acquittal upon it could not be pleaded."

Clark's Crim. Proc. 389; citing many cases.
See also State vs. Smith, 55 N. W. (Iowa) 198, at page 200.
State vs. Meekins, 6 So. Rep. (La.) 822.
Prichett vs. State, 2 Sneed (Tenn.) 285 at page 290.
Western vs. State, 63 Ala. 156.
17 Am. & Eng. Ency. Law (2nd Ed.) 584.
12 Cyc. 261.

In the Encyclopedias above referred to, cases are cited from almost every state in the Union sustaining the principles here contended for. At said second trial no verdict of any kind was reached nor was any penalty imposed on plaintiff in error. Hence the doctrine laid down by this court in U. S. vs. Ball, 163 U. S. 662, cannot apply.

The plea of former jeopardy interposed by plaintiff in error at his third trial was for the offense of murder in the first degree (Tr. 5) and it cannot now be maintained that defendant should be liberated from his conviction of manslaughter on the ground that the information on which he was tried may have been sufficient to sustain a conviction for some other offense. The only other offense that the informatin,o by any possible construction, included was that of assault, and assault is not a degree of murder or manslaughter. It is a separate and distinct offense, and a conviction or acquittal would not bar a prosecution of murder in any degree, including manslaughter. And if this information prior to amendment charged only assault it was so amended prior to the third trial of defendant as to charge the crime of murder, and it is on this last or amended information that plaintiff in error was convicted.

Again, with reference to the time the jury had the case under consideration the transcript discloses the following facts:

> "Done in open court this 11th day of July, 1904 * * *. Thereupon court read its instruction to the jury. Whereupon respective counsel addressed the jury * * *."
>
> Tr. page 83.

"Done in open court this 12th day of July, 1904. The trial of this cause was this day resumed; present defendant in person and by counsel, the county attorney, associate counsel for the State, and the jury. Whereupon respective counsel concluded their arguments to the jury and said jury retired in charge of a sworn officer to deliberate upon their verdict.

Tr. page 83.

"Done in open court this 14th day of July, 1904. In this cause the jury returned this day into open court, the defendant being present in person and by counsel. Whereupon it satisfactorily appearing to the court that there is reasonable probability that the jury cannot agree, the court ordered the jury discharged from further consideration of this case. * * *."

Tr. 83.

The transcript does not set out at what hour of the 12th of July the case was given to the jury, nor on what hour of the 14th, the jury was discharged, but if the case was submitted to the jury at 6 o'clock on the evening of the 12th of July, and the jury was discharged at 10 o'clock on the morning of July 14th, a period of forty hours intervened. This computation of time gives the plaintiff in error the benefit of all doubt. But if the argument of counsel did not consume all of the two days of the 11th and 12th of July, 1904, or if the jury were not discharged until after 10 o'clock on the 14th, then the case was held by the jury for more than forty hours.

The fact alone that the jury have been in retirement for forty hours or more without reaching a verdict is, *of itself*, sufficient ground for the discharge of the jury by the presiding judge in the sound exercise of his discretion.

"The plea of former jeopardy was rightly held bad. It averred that the discharge of the jury at the former trial without the defendant's consent was by the court, of its own motion, and after the jury, having been in retirement to consider their verdict for forty hours, had announced in open court that they were unable to agree as to these defendants. The further averment that 'there existed in law or fact no emergency or hurry for the discharge of said jury, nor was said discharge demanded for the ends of public justice' is an allegation, not so much of specific and traversable fact, as of inference and opinion, which cannot control the effect of the facts previously alleged. Upon those facts, whether the discharge of the jury was manifestly necessary in order to prevent defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion. (United States v. Perez, 9 Wheat. 579; Simmons v. United States, 142 U. S. 148.)

Logan vs. U. S., 144 U. S. 297-298.

See also:

Dreyer vs. Ill., 187 U. S. 71, at pages 85 and 86.
Thompson vs. U. S., 155 U. S. 271, at page 274.
Simmons vs. U. S., 142 U. S. 148, at page 154.
U. S. vs. Perez, 9 Wheat. 579.
Ex parte Lange, 18 Wall. 163, 165.

"The discharge of a jury in a criminal case because of their inability to agree upon a verdict after a protracted deliberation does not entitle the defendant to his discharge on the ground that he has been once in jeopardy." (Syllabus.)

State vs. Nelson, 26 Ind. 366.

"The discharge of a jury in a criminal case without agreeing on a verdict is a matter resting in the sound discretion of the court in which the trial is had.

People vs. Green, 13 Wend. (N. Y.) 57.

The record does not show just what independent inquiry was made by the court or what statements were made by

the jury to the court as to the probabaility or improbability of an agreement by the jury, it simply there recites that "whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree," etc. This necessarily implies an investigation sufficient to satisfy the court, and the law presumes "that official duty has been regularly performed."

Subdiv. 15, Sec. 3266 Code Civ. Procedure.

> "The reasons upon which the court deems it proper to discharge the jury are not required to be placed on record; it is sufficient that it shows the jury were unable to agree. The judge is not bound to take as final the statement of the jury that they cannot agree upon a verdict, but when such statement is made the court below, familiar with the nature of the evidence, and probably the temperaments of the men who compose the jury, is better qualified to say whether there is a reasonable probability of an agreement than the appellate court; certainly the latter ought not to interfere with the ruling except in cases of clear abuse of discretion. (People vs. Smalling, 94 Cal. 115.)

People vs. Greene, 100 Cal. 140, at page 142.

The burden is upon the plaintiff in error to show that the record of the discharge of the jury sustains the defense of plea of former jeopardy.

State vs. Pianfetti, 79 Vt. 236.
O'Connor vs. State, 28 Tex. App. 288.
State vs. Heath, 8 Mo. App. 99.
People vs. Trimble, 67 N. Y. 364.
9 Ency. Pleading and Practice, 637.

And the plaintiff in error cannot alter the record by inserting an allegation in his plea of former jeopardy that the jury simply reported that they "had not agreed." He

must affirmatively show facts by the record that will justify the court or jury in sustaining his plea. The only proof or offer to show this in the case at bar was the record, and the record does not show, either affirmatively or otherwise, the presence of such facts.

"The defendant is not entitled to impeach the record by extrinsic evidence of facts showing an erroneous exercise of judicial discretion in discharging the jury."

People vs. Smalling, 94 Cal. 116.

The fact that the record shows that thejury were out at least forty hours and then returned into court without a verdict is sufficient of itself to justify the court in discharging it.

Logan vs. U. S., 144 U. S. 297.

And the fact that the jury *was discharged* after coming into court and making its report shows that the court *was satisfied* that the jury could not agree. The court first satisfied itself that a legal necessity existed for the discharge of the jury and then perfunctorily used the words of the statute in the minute entry regarding the action of the court in making the discharge.

The necessity for the discharge of the jury must have been first determined upon or the jury would not have been discharged at all, and the form of the words employed is wholly immaterial. The "jeopardy" is not bottomed upon a mere formula of words, but upon the facts and circumstances from which the court reached the conclusion that a necessity existed for the discharge of the jury. We

are not able to distinguish any difference in the practical meaning between the clause "it satisfactorily appearing to the court that there is no reasonable probability of the jury agreeing" and the clause "it satisfactory appearing to the court that there is a reasonable probability that the jury cannot agree." For both must rest upon sound discretion of the court and this discretion must be based upon the facts and conditions appearing at the time the order of discharge is made.

Many cases may be cited based upon statutes worded differently from said Section 2125 of the Penal Code of Montana, in stating the grounds upon which the court in the exercise of its discretion may discharge the jury without consent of the parties. The language used by the courts in citing and discussing such statutes merely follows that of the statute considered. Such cases do not, however, hold that the wording of said Section 2125 is not sufficient in an order of a court discharging a jury. Nor do such cases conflict with the law as laid down in Logan vs. U. S. and Dreyer vs. Ill., cited above, to the effect that the discharge of the jury for failure to agree is a matter resting in the sound discretion of the court. The decision of the Supreme Court of Montana appearing in the transcript at pages 100 and 115 appears to us to be based upon sound reasoning and is a construction by the highest court of the State of a State statute.

The learned Chief Justice of the Supreme Court of the State of Montana did not disagree with the majority of the court as to the correctness of the conclusions reached

relative to the questions presented by the appeal (Tr. 104), and the State does not here contend that an acquittal or conviction is *always* necessary to sustain a plea of former jeopardy. No such question is presented by this appeal, for here there was neither an acquittal nor a conviction. There was no verdict at all.

Nor is there any question presented here as to whether it would be an abuse of discretion for the trial court to order the discharge "after the jury has been out five minutes" (brief of plaintiff in error 39) for the transcript here affirmatively shows that the jury had been deliberating upon this case for at least forty hours, and that is sufficient.

Logan vs. U. S., Supra.

And this fact sufficiently shows that a necessity did exist for the discharge of the jury, for it certainly cannot be contended that it is the duty of the trial court to hold the jury until some members of the jury have surrendered their candid convictions and in order to secure their discharge have consented to a verdict which did not meet the approval of their judgment. And if, as apparently contended for by counsel the words used by the court in discharging the jury are absolutely conclusive the defendant would always be at the mercy of the court, for the court could very easily use the formula approved by counsel, even though the jury had been deliberating only five minutes.

We have not in this brief discussed the question of jurisdiction for the reason that the State of Montana stands

upon the merits of the controversy and maintains that the plaintiff in error never was placed in second jeopardy.

We respectfully submit that the judgment of the Honorable Supreme Court of the State of Montana should be affirmed.

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Twining v. State of New Jersey, 29 Sup. Ct. Rep. 14.
Maxwell v. Dow, 176 U. S. 581.

Court of Lewis and Clark County, Montana, charging the defendant, now plaintiff in error, with the crime of murder. Upon a trial he was found guilty of murder in the second degree and sentenced to imprisonment for life. The judgment was reversed by the Supreme Court and a new trial ordered. 29 Montana, 508. The record recites that on the second trial the jury retired for deliberation on July 12, 1904, and that on July 14, 1904, they returned into court, "whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree the court ordered the jury discharged from the further consideration of this cause," and remanded the defendant to the custody of the sheriff. On the third trial the defendant interposed a plea of once in jeopardy, on the ground that the jury was improperly discharged at the end of the second trial. The Montana statute provides:

"Except as provided in the last section [a section respecting sickness or accident] the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is reasonable probability that the jury cannot agree." Section 2125, Penal Code; vol. 2, Montana Codes, p. 1061.

The court overruled the plea, and, as a result of the trial, the defendant was found guilty of manslaughter and sentenced to imprisonment for the term of ten years. This judgment was sustained by the Supreme Court. 33 Montana, 501. Thereupon the case was brought here on writ of error.

Mr. Thomas J. Walsh, with whom *Mr. Cornelius B. Nolan* was on the brief, for plaintiff in error.

Mr. W. H. Poorman, with whom *Mr. Albert J. Galen*, Attorney General of the State of Montana, and *Mr. E. M. Hall* were on the brief, for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

The defendant during the trial having specifically claimed that the action of the court in denying him the benefit of the plea of once in jeopardy operated to deprive him of his liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, our jurisdiction of the writ of error cannot be questioned. *Beer Co.* v. *Massachusetts*, 97 U. S. 25–30; *Bohanan* v. *Nebraska*, 118 U. S. 231; *Boyd* v. *Thayer*, 143 U. S. 135–161.

On the merits, there is little room for controversy. In *United States* v. *Perez*, 9 Wheat. 579, 580, this court passed upon the question arising under the Fifth Amendment, whose language is in this respect more specific than that in the Fourteenth Amendment, the former applying to the courts of the United States, the latter to the action of the State, and it was held:

"We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject in the American courts; but after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further

proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

This has been the settled law of the Federal courts ever since that time. *Logan* v. *United States*, 144 U. S. 263, 297; *Thompson* v. *United States*, 155 U. S. 271, 274; *Dreyer* v. *Illinois*, 187 U. S. 71, 85.

Those decisions dispose of the question here presented, without considering whether the Fourteenth Amendment in itself forbids a State from putting one of its citizens in second jeopardy, a question which, as it is unnecessary, we do not decide. The record shows that the jury were kept out at least twenty-four hours, and probably more, and the trial court found that there was a reasonable probability that the jury could not agree. This is the only Federal question, and, finding no error therein, the judgment of the Supreme Court of Montana is

Affirmed.